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Professor of Economics in the University of Wisconsin

THE LAW OF CITY PLANNING AND ZONING

The Citizen's Library of Economics, Politics and Sociology

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THE LAW OF CITY PLANNING AND ZONING. By FRANK BACKUS WILLIAMS, A.M., LL.B.

THE LAW OF CITY PLANNING AND ZONING

BY

FRANK BACKUS WILLIAMS, A.M., LL.B.

Of the New York Bar

New York

1922

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INTRODUCTION

By AUBREY TEALDI

Professor of Landscape Design, University of Michigan.

City Planning in its broad modern sense is a very recent development in America. Less than three decades have passed since the first conscious effort was made to prepare a comprehensive plan for the improvement, embellishment and future development of a large city. However, only within the present century has the movement become at all general. During this time many cities, both large and small, in every section of the country have grappled with the problem of their economic, hygienic and æsthetic development.

At first the movement in civic improvement was mainly confined to the idea of the City Beautiful so that the plans and reports dealt mostly with parks, civic centers and other specialized features that made their appeal through that idea, each one excellent in its way, but fulfilling only a narrow purpose too often totally unrelated to the city as a whole. It was not till later that the less showy but fundamental questions such as transportation, water supply, sewerage systems, etc., were taken into consideration as essential parts of civic improvement. Even then the reports too often illustrated and placed great emphasis upon city embellishment and improvement in other countries without making due allowance for the local conditions and specially for the legal status of city planning in those countries.

In general it may be said that in the earlier planning reports the legal side of city planning was given little or no consideration. The result was a failure, either wholly or in part, to accomplish their purpose. This failure was easily traceable to the lack of legal foundation for carrying out the plans recommended in the reports. The need of a sound legal basis

for city planning in the United States soon became apparent. In fact it did not seem an exaggeration to say that the most important profession in connection with city planning was the law, and that the lawyer, at least for the time being, was the one most fundamentally concerned with its progress. While it is evident that city planning cannot be a one-man's concern, and that for the best accomplishment it must be the result of the united efforts of the lawyer, the engineer, the landscape designer, the architect, the economist and others, it is still true today that in most cases without the efforts of the lawyer the others would be helpless. And it will continue to be true until such time as that sound legal basis has become an accomplished fact.

City planning as a science and as an art has been taught for some time at more than one American University, but generally until quite recently the legal side of the question has not been given the prominence that is essential. It was this consideration that in 1915 suggested a course of lectures on city planning law in connection with the instruction in city planning at the University of Michigan, where one of the aims was to spread a knowledge of the elements of the subject more widely rather than confine it to the students of any one department.

With this end in view Mr. Frank B. Williams of the New York Bar was invited to deliver a series of lectures at this institution. Mr. Williams was particularly well qualified to act as leader in this pioneering movement. As a student of city planning law his experience had been wide. He had founded and was Chairman of the City Planning Committee of the City Club of New York, he was director of the Municipal Art Society of New York, Member of the General Committee of the National Conference on City Planning, had been sent abroad by the City of New York in 1913, and again in 1914, to investigate and report on building regulation and zoning, and had drafted the New York City Planning Law of 1913. Mr. Williams accepted the invitation and was appointed non-resident Lecturer in City Planning Law in the Department of Landscape Design; the lectures were delivered

in the spring of 1916. These lectures were the first attempt to present the subject of City Planning Law as an entity. Their immediate result was a much clearer understanding among the different colleges and departments of the University of the close interrelation of all the professions concerned in the development of urban and rural planning. The fact that Mr. Williams was invited to repeat his course of lectures at a number of other Universities was proof that the interest in the subject was by no means confined to this institution.

In introducing his subject Mr. Williams said: "A free country is of necessity a country regulated by law. Rules, to do justice, must be not only inherently equitable but also certain, the same for all, known in advance to all who desire knowledge of them. A government conducted under known mandates is a government of law; any other administration may be benevolent but it cannot be just or free. Nor can the great nations of today be either intelligent or progressive in the conduct of their affairs unless directed in accordance with laws founded upon experience. An essential of justice and wisdom, however, is adaptation to things as they are,—a fact which introduces into the law an element of change without which progress is impossible.

"In free countries like ours one of the most important facts in any public undertaking is the existing law with relation to it. No public enterprise in the United States can be accomplished or even actually begun, except by methods sanctioned by the law as it exists at the time in the jurisdiction where that enterprise is proposed. A failure to know and appreciate this fact, especially in new fields of endeavor like City Planning, is one of the commonest causes of failure of our officials and public-spirited citizens to obtain practical results. Scarcely less of an obstacle to ultimate success is the failure to appreciate the possibility of changing the existing law for the better. All too often the so-called practical man in a given city or state seems to regard the law as it is in that jurisdiction at the time as a fixed fact, and its inadequacy as an insurmountable barrier to the enterprise he wishes to undertake for the common good. To dispel this illusion, a knowledge of the law

and practice with relation to similar undertakings elsewhere in sufficient accuracy of detail to ensure constructive change based upon approved modern practice, is necessary.

"It is as an aid to the citizen and the administrator who sees that to planned achievement in public enterprises a comprehensive, accurate knowledge of planning law is essential, that these lectures have been prepared."

The lectures form the nucleus of the present book, in which the progress of the past six years has been recorded and the subject has been brought up to date.[1] Wherever City Planning is practised or studied this work should be an indispensable reference and guide both for the professional and for the layman, and as such it should be a powerful influence in the necessary widespread education in all matters pertaining to civic improvement.

City Planning is a vital question; there is no human endeavor that is not intimately affected by it. Its success in the United States, more than upon any other factor, depends upon the intelligent development of public opinion. It is evidently more and more necessary to educate not only those who are directly concerned with the work, but the legislative bodies who can do so much to forward or retard its progress, and above all the American citizen who is in the end the controller of his own destinies.

AUBREY TEALDI

University of Michigan.
12th January, 1922.

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[1] As evidence of this progress may be mentioned Mr. Williams's *Report on Legal Methods of Carrying Out the Changes Proposed in the City Plan for Bridgeport,* which accompanies Mr. John Nolen's Report of 1916, and *Akron and Its Planning Law* also by Mr. Williams in connection with Mr. Nolen's Report of 1919 for that city.

EDITORIAL PREFACE

By RICHARD T. ELY

The purpose of this editorial preface is not to praise the present work by Mr. Frank B. Williams. If, as I believe, it is pace-setting and path-breaking, it needs no words of mine to assign it its proper place. "Good wine needs no bush." My purpose is rather to explain the position that this book occupies with respect to related books also published, or to be published, under the auspices of the Institute for Research in Land Economics.

As the idea of Land Economics is a new one, the very phrase itself having come into use only within a few years, I venture to give definitions of Land Economics and Land Policies, with a few words of explanation:—

Land Economics is that division of economics, theoretical and applied, which is concerned with land as an economic concept and with the economic relations which grow out of land as property.

As science, land economics seeks the truth for its own sake. It aims to understand present facts pertaining to land ownership in all their human relationships, to explain their development in the past, and to discover present tendencies of growth. As an art, it aims to frame constructive land policies for particular places and times.

A land policy takes as a starting point the existing situation with respect to the land, land as here used being equivalent to all the natural resources of the country. It examines the processes of evolution by which the existing situation has been reached and proceeds to develop a conscious program of social control with respect to the acquisition, ownership, conservation and uses of the land of the country and also with respect to the human relations arising out of use and ownership.

Books have been published on many of the topics which fall within the scope of Land Economics, but they have appeared to lack close relationship with one another. This concept of Land Economics places these works in their proper

relations to each other and gives them a unity which, it is believed, will be helpful scientifically and practically.

It will give a still clearer idea of the field if I mention the books already published by The Macmillan Company and also others for which plans have been made, which belong to this general field. The list of those already published is as follows:

Agricultural Economics—H. C. Taylor
Marketing of Farm Products—Theodore Macklin
The Marketing of Whole Milk—H. E. Erdman
The Law of City Planning and Zoning—Frank B. Williams

The list of those planned is as follows, the names of authors being omitted where definite arrangements have not as yet been completed:

Economics of Forest Land—Henry S. Graves
Outlines of Land Economics—Richard T. Ely
The Taxation of Land—Richard T. Ely
Economics of Marketing
Economics of Mineral Land
Irrigation Institutions—Elwood Mead
Rural Sociology—G. J. Galpin
Land Utilization
Range and Ranch Land
History of Federal Land Policies—B. H. Hibbard
Land Valuation
Urban Land Policies—Richard T. Ely and M. G. Glaeser
Introduction to Agricultural Economics—L. C. Gray
Economics of Water Resources
The Ownership and Tenancy of Agricultural Land—B. H. Hibbard and G. S. Wehrwein
The Marketing of Manufactured Products
The Single Tax—F. B. Garver
The Real Estate Business as a Profession—R. T. Ely and associates
Land and Credit
Farm Organization
Agricultural Coöperation
Farm Bookkeeping
Special Assessments
Land Problems of Planning
Frontier Finance in the United States
Land Values in the Cotton States
Land Values in the Grain States

On reading this list it will be observed that the books included are all economic in character and that they all relate to the land. The two works on Agricultural Economics deal with the economic aspects of agriculture and are thus distinguished from books on technical agriculture. The same holds true with regard to the book on the Economics of Forest Land. The unity is found in the idea of property in land.

It is hoped that the present work will very greatly broaden out the interest in the subjects which fall within our field. Students of the economics of land problems have too generally failed to appreciate the fact that land planning, both urban and agricultural, is absolutely essential to their solution. On the other hand, city planners have too generally failed to appreciate that fundamentally their work must be based upon economics. Land Economics, then, as a concept opens up a large practical and scientific field.

There is a great need for investigation in Land Economics. We are face to face with the gravest economic problems arising out of landed property—problems that lie at the very foundation of our economic life; and when we turn to economic treatises we find little to help us in their solution.

Thoughtful men of affairs must realize the significance of landed property and all the arrangements that are connected with it as soon as these facts are called seriously to their attention. Some of them already show an appreciation of what land questions mean for the future of civilization. Especially significant is the following quotation from the late James J. Hill, whose greatness and experience in developing a vast inland empire entitle his words to careful consideration: "Land without population is a wilderness and population without land is a mob. The United States has many social, political, and economic questions—some old, some new—to settle in the near future; but none so fundamental as the true relation of the land to the national life."

This relationship of the land to the national life is a question of property when we reach its heart, and all investigations of land problems which do not find their center in the institution of property must be superficial and unsatisfactory, leading to no permanent solutions.

The place and significance of the present work will be made more clear by some further information about the Institute for Research in Land Economics, in which the need for investigation is emphasized.

The Institute for Research in Land Economics was founded in October, 1920. It has a staff of resident research workers and has the coöperation of a number of professors in universities and agricultural colleges, and members of federal and state departments of agriculture. A group of mature and experienced graduate students have joined in its studies. The Institute has begun a number of investigations, and will, as it expands, take up others for which the need is great.

As a motto the Institute has taken the following words written by Professor Frank A. Fetter:

> My own conviction has long been that the land question far transcends any restricted field of economics and that it is fundamental to national survival and national welfare. It is truly a problem calling for statesmanship of the broadest type.

The character of the Institute is further indicated by the Board of Trustees, which consists of the following gentlemen:

Justice M. B. Rosenberry (Supreme Court of Wisconsin), President of the Board of Trustees
Richard T. Ely (Professor of Economics, University of Wisconsin), Director of Research
John H. Finley (late Commissioner of Education of the State of New York and President of the University of the State of New York. Now of the editorial department of the *New York Times.*)
Colonel Henry S. Graves (Ex-Chief of the United States Forest Service)
Henry C. Taylor (Chief, Bureau of Markets, United States Department of Agriculture)
W. S. Kies (Banker, Aldred and Company, New York City)
Albert Shaw (Editor, *Review of Reviews*)

Finally, it may be said that the Institute for Research in Land Economics has no private aims. All the funds which are received are devoted to its work just as in the case of an endowed university.

Richard T. Ely,
Director, Institute for Research in Land Economics.

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The author takes this occasion to express his gratitude to the officials and specialists who have so often in the past given him information and the benefit of their opinions in city planning and allied subjects. He wishes especially to thank Thomas Adams, Esq., former President of the Town Planning Institute of Great Britain, Secretary and Manager of Letchworth Garden City, and Town Planning Inspector to the Local Government Board of England and Wales, and at present Housing and Town Planning Adviser to the Commission of Conservation of Canada; Albert S. Bard, Esq., of the New York Bar, who acted as secretary of the Mayor's Bill Board Advertising Commission, and has been for so many years a Director and twice the President of the Municipal Art Society of New York; Major George B. Ford, again in New York, after his work for the Red Cross and the Renaissance des Cités in reconstructing France; Dr. H. Lindemann, editor of Kommunales Jahrbuch and Director of the Institute for Social Research at Cologne; Hendrick W. van Loon, Esq., the historian in severe print and gayer but no less instructive pictures; Dr. John Nolen, the planner of many cities; Frederick Law Olmsted, Esq., many times President of the National Conference on City Planning and the American City Planning Institute, and at this time President of the American Society of Landscape Architects; Lawson Purdy, Esq., for many years the President of the Board of Tax Commissioners of the City of New York; M. Georges Risler, founder of the Société des Habitations à Bon Marché and the Société des Architects Urbanistes and President of the Musée Social, and Dr. Delos F. Wilcox, formerly Deputy Commissioner of Water, Gas and Electricity, New York City, for their kind criticisms of portions of this work; and especially Edward M. Bassett, Esq., eminent authority on the law of city planning and zoning,

for his helpful criticism of the book as a whole; for the statements and opinions of which, however, the author assumes entire responsibility.

The author wishes also to thank the Chamber of Commerce of Akron, Ohio (for whom *Akron and its Planning Law* was written), the City Planning Commission of Bridgeport, Connecticut (for whom the *Report on Legal Methods of Carrying Out the Changes Proposed in the Plan of Bridgeport* was prepared), D. Appleton and Co., publishers of *City Planning* (National Municipal League Series, New York, 1916), and the editors of the *American City, Journal of the American Institute of Architects, Landscape Architecture,* and the *National Municipal Review,* for their permission to use again material first printed by them.

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THE LAW OF CITY PLANNING AND ZONING

PART I

GENERAL PRINCIPLES

CHAPTER I

SCOPE

Definition of City Planning.—City or town planning[1] is the guidance of the physical development of communities in the attainment of unity in their construction. Wherever in any locality a sufficient concentration of population has occurred to create complexity, here will be found a network of interests, each seeking its expression in the physical life of that locality; and it is the task of city planning, either by prevention or by cure, to bring these interests into harmony, in the unity of that locality.[2]

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[1] In England, where the word "town" means any collection of buildings however large, the science is called town planning; while in the United States, where the larger aggregations are generally referred to as cities, the expression city planning is the one generally employed. The phrase town planning is in common use in Canada and Massachusetts.

[2] The extent to which city planning should go into detail, is governed largely by practical considerations. The "Introductory Statement" of the American City Planning Institute, based upon the report of a sub-committee of which Frederick Law Olmsted, Esq., was chairman, says on this subject:

"2. City Planning . . . is concerned with the territory occupied or to be occupied by any community and with prospective physical alterations in that territory and the objects upon it, in so far as such alterations can wisely be controlled or influenced by concerted action in the interest of the community as a social unit.

"3. No prospective physical alteration is so small, so localized, or so

Planning Small Places.—In this country the planning of localities is usually referred to as "city" planning. This is no doubt due to the fact that until recently all our planning legislation, recognized as such, applied only to cities, and interest in planning was confined almost exclusively to large cities. In

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specialized in technique as to be excluded merely for that reason from the scope of city planning, provided it can wisely and effectively be controlled in the common interest. . . .

"5. In theory there are no limitations to the extent of coördination desirable among the diverse planning activities which shape the physical growth of a community or to the desirability of estimating future contingencies and taking account of them in planning; but practically there are decided limitations upon the amount of time and effort which can be withdrawn from the vital business of getting things done for the sake of study and of planning what to do and how best to do it.

"*a*. The so-called 'practical man' is apt to underestimate the value of far-sighted, deliberate and well-coördinated planning; while the so-called 'theorist' is apt to overestimate the extent to which such planning can profitably be carried and to underestimate its cost in delays and in dissipation of energy which might be producing more immediate practical results. The well-balanced city planner, along with his broad grasp of underlying theories, recognizes that practical results year in and year out are the final test, and shapes his work accordingly.

"*b*. It is important therefore to apply sound, clear, penetrating common sense to the problem of *how far it will pay to go* with investigations and planning, under any given conditions, before proceeding to the execution of plans.

"6. The classes of specific planning problems which are most distinctively matters of city planning are:

"*a*. Those which lie so much outside of the fields effectively covered by existing specialized planning agencies that the community is likely to suffer from their neglect. Such specialized fields include, for example, sewerage, water-supply, parks and rapid transit.

"*b*. Those in which a close coördination of planning in separate fields of technical work is likely to secure advantages commensurate with the effort of obtaining such coördination.

"*c*. Those in which the permanent interests of a community justify the framing of plans for specific improvements in such a manner as to meet not merely the immediate objects of the improvements but also the contingencies of a remoter future or community needs which are only indirectly connected with those objects.

"7. Merely to deal with problems of the above classes as they arise in the course of community growth is city planning of an opportunist sort. But constructive city planning requires also that many such problems, long before they become acute, shall be anticipated and considered under the impulse of imagination applied toward the attainment of the larger social objectives of the community. . . .

"9. Just as city planning must unite the points of view of many technical specialists in approaching its problems and must balance a regard for immediate expediency with a far-sighted outlook to the future, so it must appreciate at their full importance and must adequately harmonize, in every one of its problems, the requirements of convenience, healthfulness and efficiency in operation, of orderly and beautiful appearance and of economic ability to meet the costs."

Germany the planning provisions apply both to small and to large places and planning is carried on in both. In this country, too, in several of our states planning laws for towns and villages have recently been passed, of which, however, little use has as yet been made.

It is essential that every locality in which any degree of concentration has occurred or may be expected should be regulated in its growth; the smaller the place the greater being the opportunity of planning. For this reason it has been suggested that a name be selected for the science which would not by implication exclude the guidance of the growth of the small locality. Probably as good a name for this purpose as any would be "community planning," if indeed it is really worth while to attempt to supersede the expressions now in general use.

Planning for the Community to Come.—In the United States we are apt to think only of the planning of communities already in existence, and in practice we rarely attempt to guide their growth until they have already attained a considerable size. This is a grave mistake. For good or for ill, as soon as two roads of a given width cross at a given place and angle, and a building starts at the intersection, important features of the future community, its life and growth, have been carelessly, perhaps, but in all probability irrevocably fixed. The British planning acts of 1909 and 1919, and the statutes in many other parts of the British Empire modeled on them, provide for the planning not only of "any land which is in course of development" but of land which "appears likely to be used for building purposes." This clause has fortunately received a broad interpretation in England, and land there has been planned under it which will not, in all probability, be built on for fifty or a hundred years. Nevertheless, for much of England the provision comes too late. In Canada and other parts of the Empire, under similar provisions, more may still be done; but nowhere does it assure all that is necessary, and the attempt is constantly being made by statutory amendment and improved practice, to plan future building land earlier and more generally.

Regional Planning.—Of late much has been written and something done, in the way of the survey of the needs and resources of regions much larger than a single city or town. This idea has now spread to city planning. In planning, as in other fields, the unit varies with the purposes and scope of the undertaking; for some purposes the city, for others a district of which the city is the focus, a larger district embracing many cities, or even the state, the nation or the continent itself, being chosen. The object of the regional plan, as in all planning, is to bring about as efficient and unified a physical development of the unit as possible. A regional plan supplements, rather than supplants, the plans of the individual communities in the region selected.

City Planning Distinguished from City Construction.—City planning, as its name indicates, deals with the planning of communities rather than with their construction. The importance before doing the work of making the plan and following it except as deliberately varied or supplemented, is more or less self-evident, and will be shown more fully later. Certain phases of the law and practice of city construction, however, are so closely related to the planning of that construction that they should be considered in connection with it, and are, therefore, to be regarded as a part of city planning, to be taken up in treatises on that subject, such as this.

Scope of City Planning.—Since the purpose of city planning is the attainment of unity in city construction, it includes not only the planning of the community as a whole but of any portion or detail of it, viewed as a part of the entirety. Thus the location of a park, and of its transverse drives, walks, etc., in their relation to the thoroughfare system of the city, and the determination of the general character of the park as a part of the entire recreation system of the city, are functions of city planning no less than of landscape architecture; the determination of details of the scheme of planting, of scenic drives and walks, etc., are matters of landscape architecture into which the city plan cannot afford to go without risk of dissipating energy and failing to accomplish its larger object of general coördination. Similarly, a scheme of main trunk

sewers, their controlling grades, capacities and points of outfall, as related to street locations, etc., is a matter of city planning no less than of sanitary engineering; the detailed design of these sewers and the design of local laterals, etc., is an important matter of sanitary engineering but of minor concern in city planning.

Building Regulation and Zoning.—City planning is sometimes thought of as the planning only of the public features of a city, such as its streets, parks and public buildings. Most of the land within the limits of a modern city, however, is privately owned and used; and if the entire city is to be planned, the development of this land must also be guided. For the most part city land in private use is employed or destined for employment as the site of buildings. Almost invariably the construction of buildings in cities is governed by a voluminous and detailed building code, most of which consists of rules with regard to stresses and strains, the choice of materials for fire proof and semi-fire proof buildings, the minimum width of stairs, plumbing, height of rooms, etc. This is a science in itself, into which city planning cannot go with profit either to building construction or to city planning. It can deal, however, with those aspects of building which more directly affect the use of other properties, such as the height and area of structures and their general use, especially when these rules vary in different parts of a city, thus establishing districts each to some extent with a character of its own.

Housing and City Planning.—Of the buildings of the modern city, erected for all the many purposes for which buildings in cities are needed, residences are by far the most numerous. In the construction of these buildings, city planning may regulate the more general aspects, but cannot go into detail. For the good of both, housing and city planning as sciences should remain distinct. Nevertheless, the difficulty of the housing problem, and the importance of planning in its solution, has often resulted in legislation dealing with both subjects within the limits of the same law.

Other Phases of City Planning.—Recent city planning

literature abounds in pleas for planning activities variously called rural or country, metropolitan, county, state, national, interstate and international, planning. These expressions have never as yet been clearly defined or distinguished, and are often used by different writers with different meanings. On analysis they will, it is believed, be found to signify: (1) planning of territory of a particular character; or (2) planning within the limits of a particular governmental unit; or (3) planning under the jurisdiction of a particular governmental unit; or (4) more than one of these activities.

Rural Planning; Country Planning.—Rural planning may have one or more of the following interpretations: (1) planning of territory, rural in character, for farming and similar rural uses. Important as this is for national life, obviously it is not city planning; (2) planning for urban use of those parts of a district, prevailingly rural in character, which are, or are likely to be, built up with any degree of concentration, such as present or prospective villages and smaller and more amorphous aggregations. Such planning comes within the scope of city planning as defined and discussed in this work; (3) planning in territory, rural in character, of roads, parks, drainage systems, etc. In so far as such roads and other features are entirely for rural use, this is not city planning; in other cases it may properly be regarded as within the scope of city or regional planning and is so treated in this work; (4) planning within the limits of, or under the authority of, a non-urban local governmental unit. The territory may be urban or rural in character. This expression is used in this sense, at times, in England and Canada, but not in the United States.

Country planning has the same meaning as rural planning, (1), (2) and (3).

There is a growing tendency to treat as an entity the various phases of rural or country planning, both those which may be considered as city planning and those which cannot be so considered. This tendency is the result of the recognition of the fact that both rural and city planning are parts of the more inclusive task of community organization, between which no sharp line can be drawn.

Metropolitan Planning.—Metropolitan planning is the planning with a view to the conservation both of their diverse and of their common interests, of a city or group of cities and the outside territory within its sphere of more immediate influence. In the accomplishment of this result, it is the division of this district by jurisdictional lines that creates the administrative difficulty. In a number of foreign countries, in cases where the district is entirely within the limits of a larger local government, this government is given the necessary jurisdiction; and where the national or the state government has assumed supervision over local planning, it has often undertaken this task. In this country, as a partial solution of this problem, a number of states have given the city a limited planning jurisdiction outside its legal boundaries; and as a more complete solution, in one case, have created an inclusive planning authority, leaving jurisdiction in other matters to the various local authorities. Where the lines dividing the city or district are provincial or state, or are national, the administrative problem is still more difficult. These questions will be taken up hereafter.

All metropolitan planning is a species of regional planning, a proper distinction between the two being perhaps that metropolitan planning concerns itself with the more distinctively urban problems, and regional planning to a greater extent with the development, conservation, and utilization of natural resources.

County Planning.—County planning may have one or more of the following meanings: (1) the city planning under county authority or otherwise of the more populous parts of the county; (2) the regional planning of the county or of some of its main features, such as principal roads, parks, drainage systems, etc.; (3) the administrative supervision of local planning in the county.

State Planning.—State planning may have one or more of the following meanings: (1) the planning by the state of its capital city, or such parts or features of it as are within the direct planning jurisdiction of the state government; (2) the coöperation of the state with the city and other local authorities

in the planning of the state capital and the neighboring territory; (3) the administration and supervision by the state of planning by local authority; (4) the direct planning of localities by the state; (5) the promulgation and enforcement of certain planning rules applicable throughout the state in all cases or in all cases of the same class or character, as for instance minimum requirements as to the space to be left around the dwellings, to be found in state housing and tenement house laws; (6) the regional planning of the state. Such planning may be (*a*) the more or less complete regional planning of certain portions of the state, or of all the territory within it; (*b*) the planning, for all or a portion of the state, of certain features properly part of a complete regional plan, such as certain systems of roads, parks, drainage, etc.; (*c*) the conservation, development, and apportionment of the resources of the state, or one or more of them, as is done in many states to some extent by state boards of conservation, etc.; (*d*) the distribution of industries and population throughout the state with relation to agricultural and other resources. This might be done to a very considerable extent by regulating the location of railroads and fixing passenger and especially freight rates, upon which industry, and the distribution of population, are so largely dependent.

National Planning.—The distinction between state and national planning exists in countries which are federations of states or similar units, like Canada or the United States, and has no place in countries with a centralized government, like England and France. The scope of state and national planning, respectively, in federations, depends upon the federal constitution of the country in question. The jurisdiction of the states and the nation in the United States, under our Constitution, will be taken up in that part of this work devoted to administration. In brief this jurisdiction is as follows:

The United States has (*a*) full planning power over those portions of the country which are not within the limits of any state, except in so far as it has delegated this power to local governments; (*b*) planning power over areas within the states, acquired for special federal purposes, such as forts, sites of

federal buildings, national parks, etc., in so far as is necessary for the fulfillment of the purposes for which they were acquired; (*c*) planning power in so far as incidental to power over matters which by the Constitution are of federal concern, such as interstate commerce, navigation, and post roads, which now includes railroads; (*d*) power of experimenting, collecting and disseminating information and giving advice to state and local authorities and to individuals in their planning. This power is not given the nation by any specific provision in the Constitution, but is held to be inherent in the national, as in every government. It is therefore also a power of the state and local governments; but many things can be done under such a power more completely and effectively and more economically by the nation in behalf of all the states, than by each state for itself. The United States government has made little use of its planning powers.

Except as possessed by the United States, and to some extent concurrently with it when the Federal government has jurisdiction, planning power over territory within the limits of each of the individual states is in that state to be exercised by it, or delegated to local governments within it as it sees fit.

Interstate and International Planning.—Interstate or international planning is the planning of enterprises or territory common to more than one state or nation, such as the bridging of a stream flowing between two sovereignties, or the regulation of its flow, the planning of a city or region on both sides of the boundary, etc. In centralized countries, such as England, there is no interstate, as distinguished from international, planning; while in federal countries the limitations of the federal constitution on the powers of the "sovereign" states to a greater or less extent differentiate the two.

Interstate and international matters may be adjusted by agreement, managed by joint commissions, etc., but such methods, sufficient for the accomplishment of a definite enterprise limited in time, are most unsatisfactory where continuous development and administration for the indefinite future are necessary. In a few such cases, as for instance for the improvement of the navigation of the Danube, international

agreement has established a continuing local government, and there is reason to think that the same expedient may be adopted in interstate planning of a similar character; indeed such an authority for the port of New York, located partly in the state of New York, partly in the state of New Jersey, has already been appointed by the two states, in the solution of the difficult and important administrative problem without which the planning of the port as a unit seems impossible.[3]

City Planning Law.—City planning law is the law relating to city planning matters. The subject will be taken up under the following heads:

I. General Principles.
II. Planning the City as a Whole.
III. Planning the Public Features, such as the streets, parks, etc., and including the quasi-public features, often privately owned, but always subject to public regulation, such as street railways, water works, etc., etc.
IV. Planning the Private Features, such as the land privately owned and used, and the buildings to be erected on it, in some of their more general aspects.
V. City Planning Finance.
VI. Planning for the Promotion of Beauty.
VII. City Planning Administration.

[3] See p. 548.

CHAPTER II

FUNDAMENTALS

Basis of Right of Public to Plan.—A city consists of land assigned to streets, parks and other public purposes, and of land devoted to houses, stores, factories and similar private purposes. To the attainment of unity in city construction, which is the aim of city planning, some measure of control over all this land, whether publicly or privately used, is necessary. This guidance the state may exercise in two ways: by government ownership and by governmental regulation. The legal principles under which this ownership and regulation are obtained are fundamental in city planning law.

Planning by Right of Ownership of Land.—It is by virtue of its title to the land that the public plans the public features of cities. In order to construct these features the public must own the land necessary for the purpose and, once owning it, may build these features much as it sees fit. As land owner the public also indirectly but profoundly influences private development. For instance, the method of subdividing land is an important factor in determining its use. Thus if the lots in a residential area are deep and narrow, the houses on them are usually narrow or there are houses both on the front and the rear of the lot, and in either case the supply of light and air is almost invariably insufficient. With wide, shallow lots these particular evils are not so apt to occur. Again, a district of large lots is better fitted and therefore more likely to receive heavy industrial development, a section of small lots to be chosen for other uses. Now it is the layout of public streets which, by fixing the size and shape of blocks, is the most important factor in land subdivision. So too in various ways private use of land is strongly influenced by the location and

method of construction of other public features such as parks, docks, and public buildings.

The Power to Condemn Land.—As a rule the land which the public owns in a city is already devoted to some specific public purpose, and the city as it grows must acquire the land for its public features from private owners. Manifestly the power of the public by land ownership directly to control the public features of the city and indirectly to influence its private features, is dependent upon the right to acquire this land. Like the private citizen the state may do this by agreement with the owner. In order, however, that public improvement may not be hampered by private greed or whim, it is essential that the state should be able to "condemn" the land it needs, taking it without the consent of its proprietor. This right of "eminent domain," as it is called, is the first legal power fundamental in city planning to be examined and related to the law as a whole.

The Power to Regulate the Use of Land Privately Owned.—Deeply as the public, by virtue of its control as land owner over the city's public features, influences the development of land privately owned, it is not in this way exercising any power beyond that possessed by any land owner similarly situated. Frequently the proprietor of an extensive tract lays it out in streets, parks and other features public in character, and in lots for industrial, residential and other uses essentially private. Occasionally—as, notably in Letchworth, Hampstead, and other garden city and garden suburb developments—this has been done for the purpose of affecting the private use of land in those localities; and, in fact, has had this result to a marked extent. Except, however, as the garden city companies retain some degree of ownership in the land which has passed into private uses—as they often do—this influence is all the power that the company has over private use. Unlike the private citizen or company, the public is not so limited. It is also ruler, and by law and ordinance may directly control private land and the persons using it. And we are beginning to see the need of this direct control and to avail ourselves of it. In spite, in some cases, of adequate planning of public features, cities become congested and confused, and we are

learning to rely upon building regulations to remedy, or at least check, these tendencies. This power of regulation in the public interest, called the "police power," is the second of the two powers fundamental in city planning which it is the function of this work to examine and relate to our law as a whole.

In this undertaking it will be necessary at the outset somewhat more accurately to define and distinguish between the power of eminent domain and the police power.

Eminent Domain.—Eminent domain is the power of the state to take the property of the private citizen. In all civilized countries it is exercised only for a public purpose, on payment of compensation. Manifestly the state exists for the good of its citizens and should not take property or do any other act except for the public advantage—it is only in a despotism that the monarch seizes property for his own use or to reward a favorite. Manifestly, too, the state should pay for the property it needs, making its levy for this purpose as equally as possible upon all its property owners instead of upon one.

The manner of securing the enforcement of these conditions upon the exercise of the power of eminent domain differs in this and in other countries. In England, for instance, Parliament has the power to pass any law it pleases and is only restrained by public opinion. On the continent of Europe these conditions are generally contained in fundamental law, but the duty of guarding that law is entrusted to the legislature.[1] In this country not only are these requirements in our

[1] Thus the French "Declaration of Rights" of 1791, inspired by the bills of rights in our constitutions, contained much the same guaranties, including the guaranty of private property rights; and these guaranties are, expressly or by implication, a part of all subsequent French national constitutions, which the French legislator in his acts is in duty bound to respect, and does respect. See in general Baltbie, *Droit Public et Administratif* (2d ed., Paris, Larose and Furcel, 1885), and similar books; and also the Civil Code, art. 545. In Germany, too, under the constitutions in force before the war, the rights considered by us as fundamental, including the right of private property, are guaranteed by provisions which as a rule are more difficult of legislative enactment and repeal than the usual provisions of law. They were contained in the national constitution of 1849, but not that of 1871, since they were to be found in the constitutions of the individual states. In so far as the pre-war constitutions have been superseded, the new provisions almost invariably protect private property. Many of these constitutions, if they may be so called, do not seem as yet to have been put in

written constitutions but these constitutions are construed by our courts, which hold that any legislative act contrary to their interpretation of them is void. A law manifestly taking private property for public use without compensation, could be challenged in the courts both there and here; but once passed a law restricting such rights in the name of the public and its interests is open to question only in this country.

The fifth amendment to the Constitution of the United States provides that "no person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." This is a protection against arbitrary seizure of property by the United States, but has been repeatedly held not to apply to state action. Under the fourteenth amendment of the United States Constitution, however, "no state shall . . . deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

It has been held that any taking of property in any state except for a public purpose on payment of just compensation, is not "due process of law" and is thus illegal under the Constitution of the United States. The citizens of many states, however, not satisfied with the protection against state action thus afforded by the Federal Constitution, have inserted provisions against the taking of property except for a public purpose on payment of compensation, in the state constitutions.

The legal cases interpreting these constitutional clauses fill many large volumes. Most of them involve one of two questions: (1) what is a public use, or (2) what is "property" and the "taking" of property?

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permanent form. See generally as to older constitutions, Schubert, *Verfassung und Verwaltung des Deutschen Reiches und des preussischen Staates* (20th ed., 1906), or any similar book.

In Belgium, too, the Constitution of 1831 provided (art. 11) that "No one can be deprived of his property except for a public use in such cases and by such a method as is established by law and on previous payment of a just indemnity." The enforcement of this clause is entrusted largely to the legislature.

The laws of the other European countries are similar, in this respect, to that of France, Belgium, and Germany.

Public Use.—The difficulty of defining a public use lies in the diversity of public needs and of the methods of satisfying them. It is plain that the state and its subdivisions *need* the buildings in which they carry on the work of the government in its different departments; it is less and less obvious, because less and less imperative, that the state *needs* to abolish dangerous grade crossings partly at public expense, destroy and pay for property which threatens public health, limit at public expense the height of private buildings around a state house or a public square to avoid disfigurement, allow private property, on payment, to be taken for the purpose of irrigating private land or developing private mines, in order to promote the general prosperity. It is, however, established law that the doing of these things for the promotion of the public health, safety, morals and general convenience and prosperity is a public use of property taken for the purpose.

It is plain that a building in which the state, to the exclusion of all others, performs its functions, is being *used* by the public; less and less obvious that the public is *using* property when it merely prevents an unsafe employment of it, destroys property dangerous to the public health, or prevents a use of it that will deface public property. If, however, the property is not used *by* the public, it is certainly used *for* the public to the total or partial exclusion of the private owner and destruction of his rights.

The Taking of Property.—What, then, is the taking of property, which, if for a public use, is justified by our constitutions? This will perhaps be determined best by first ascertaining what is meant by property.

Most people consider property as a tangible thing; but in fact it is intangible—not a thing, but the relation to a thing, or right to it.

In the case of land, it has been found convenient to divide the right to it into many rights. First, the division may be according to duration; land may be owned for a term of years, during life, forever, etc. These are called estates in land—for years, for life, in fee, etc. Secondly, ownership may be divided according to the purpose for which it is exercised—

the right of passage over land, for all or certain specified purposes, in any or in certain specified places; the right to profit by the taking away of some part of the land, such as sand, timber, minerals, forever or for a definite period; the right of access, or of light and air over it, or of a view across it, etc., called easements. Thirdly, the land may be divided into layers, separate ownership being allowed of the surface, the space above, the space below the surface, etc. Indeed, it is difficult to specify the possible divisions of land ownership. Complete ownership has been defined to be the sum total of the lawful rights of an individual to the possession, use or enjoyment of his land, so that when this total has in any way been abridged, lessened in value or destroyed, there has been a taking of property.

Any use or enjoyment of land, to be a property right in it, must be legally recognized as such. It is the right of a land owner not to have his land, and the air over it, invaded to an unreasonable degree by his neighbor's smoke, or smells, or noise; but rays of light may convey to him the image of an ugly billboard, and he has no redress. If the city lessens the value of his property, or authorizes a private corporation to lessen it, by erecting a viaduct in the street against it, compensation must be provided for; but the city may give a permit to a hospital to be erected near him, or itself build a jail, to his detriment, without payment to him.

Having defined property, the definition of a taking is a simple matter—it is any substantial invasion of any property right.

In some cases where injuries really substantial were held by the courts not to be a taking of property, statutes and constitutional amendments have been subsequently passed giving a remedy. The most important instance of this is the change of grade of streets. Under the older law, even after a grade had been legally established by the authorities, and the land owner had built in reliance on their action, they could change the grade and the owner had no redress. The law has now pretty generally been altered so as to require compensation not only when property has been taken but when it has been "dam-

aged" or "injuriously affected," a doctrine which protects the owner in cases of change of grade and many similar cases. This is really a case of the correction of a mistake in legal decision by subsequent statute or constitutional provision—an illogical, but convenient and effective, method of procedure.

The Police Power.—Only the smaller portion of the land within a city is needed for public uses. The rest is necessarily devoted to houses, stores, factories and other uses, private in their nature. It is conceivable that the public should own all the land within the limits of cities and thus control private as well as public use by right of ownership. Such certainly is not the case at present or likely to be in the near future; and until that time comes the public must guide the private use of city land by regulations imposed by virtue of sovereignty. Regulatory legislation is so general and of such wide application that there can, and should be, no obligation to compensate those affected by it.[2] Measures of this sort are imposed by what in this country has come to be referred to as the "police power."

What, then, is the police power? The courts, in passing on this question, have repeatedly said that it could not be adequately defined. It is inherent in the states of the American Union, and was not surrendered when the federal union was formed. Like all governmental powers, it must be exercised for the public good. Like the others, it must be used reasonably. Freund, in his standard book on the subject, defines it as the power which by restraint and compulsion aims to promote the public health, safety, morals, and general welfare. Court decisions have held that it may be used for the public convenience and the general comfort and prosperity.

All this, however, does not amount to a definition of the police power; to obtain it, many activities of the state, such as the administration of justice, taxation, eminent domain, etc., must first be excluded, and the police power remains the undifferentiated residuum of legislative authority; thus covering, as

[2] In some cases, as, for instance, the killing of tubercular cows, the statutes provide for a payment to their owners, which, however, is usually less than the value of the cows; thus mitigating the hardship and lessening somewhat the chances of concealment.

Judge Andrews of New York puts it,[3] "a wide range of particular unexpressed powers . . . affecting freedom of action, personal conduct and the use and control of property." [4]

Regulation and the Taking of Property Rights.—Regulation, if it is to have an effect at all, must necessarily deprive the persons affected by it of personal and proprietary rights which, but for the making of it, they would lawfully enjoy. The United States Constitution forbids the taking of property without compensation. Does it therefore follow that the police power for the exercise of which there is no compensation is superior to that Constitution? Not at all. Legislation under the police power is invalid, which is contrary not only to the fifth and fourteenth amendments of the Constitution, but to the commerce clause, the clause forbidding the impairment of contracts or any other constitutional provision, or to state constitutions. But constitutions are to be inter-

[3] In People v. King, 110 N. Y. 418 at 424 (1888).

[4] Professor James Bradley Thayer, of the Harvard Law School, one of the profoundest of American jurists of our time, in his *Cases on Constitutional Law* (Charles W. Sever, Cambridge, 1894), Vol. I, Pt. 2, Chap. V, entitles his chapter on the subject "Unclassified Legislative Power—The So-called Police Power." W. G. Hastings, in a well-known essay (to be found in the *Proceedings of the American Philosophical Society,* Philadelphia, 1900), after a careful historical review and analysis of the cases, concludes that the so-called police power is only the indefinite supremacy of the state. Chief Justice Baldwin of Connecticut says with relation to the matter, "the term 'police power' has at bottom no other meaning than the general power of governing its people and dominions belonging to every soverignty.

The present meaning of the term is much clarified by a short consideration of its history. The word "police" is derived from the Greek πολιτεια, meaning "pertaining to the government of a city or city state." The word included in Greek times the administration of both foreign and internal affairs, in all their phases. With the decline of feudalism and the growth of royal absolutism in Europe, the word came into use as meaning internal administration in all its branches. With the growth of constitutional government came a differentiation of other powers of internal administration, such as civil and criminal justice, taxation, etc., leaving the term "police" to stand for the remaining undifferentiated functions. In Germany today there has been a subdivision of the term. They have there not only safety police (the police in the popular sense) but many other sorts, such as building, fire, health, business, police. In other countries the same duties are performed by officers who are not called police. In this country the term was first employed in the sense referred to, by Chief Justice Marshall in Brown v. Maryland (12 Wheaton (U. S.) 419 at 443), in 1827, but came into use very slowly. The law on the subject is the growth of the latter part of the 19th century.

preted not only logically but in the light of history and the common use of words. Governments always have regulated and always must to some extent regulate without compensation the relations of one individual to others. It is not to be supposed that the makers of our Constitution intended to forbid such legislation. On this subject Justice Holmes, of the Supreme Court of the United States says: [5]

"If the fourteenth amendment is not to be a greater hamper upon the established practices of states in common with other governments than I think was intended, they must be allowed a certain latitude in the minor adjustments of life, even though by their action the burdens of a part of the community are somewhat increased. The traditions and habits of centuries were not intended to be overthrown when that amendment was passed."

The Effect of Usage and Public Opinion.—In fixing the limits of such powers as the police power and that of eminent domain, the courts have been influenced not only by past usages and customs, constituting what is already history, but by current usage and custom, which is history in the making. In this connection the Supreme Court of the United States says:

"It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States,* 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

Another instance, worthy of notice, of the recognition by the courts of the influence which public opinion rightly has in the decision as to what is for the general welfare, is furnished by the case of People v. Schweinler Press,[7] in which the New York Court of Appeals, reversing its previous opinion,[8] held that a statute regulating and limiting the hours of labor of women in factories was constitutional. In justifying this change the court says:

[5] Interstate, etc., Railway Co. v. Commonwealth, 207 U. S. 79 at 87 (1907).
[6] Noble State Bank v. Haskell, 219 U. S. 104 (1911).
[7] 214 N. Y. 395 (1915).
[8] In People v. Williams, 189 N. Y. 131 (1907).

"Especially and necessarily was there lacking [when rendering the former decision] evidence of the extent to which during the intervening years the opinion and belief have spread and strengthened that such night work is injurious to women; of the laws, as indicating such belief, since adopted by several of our own states and by large European countries, and the report made to the legislature by its own agency, the factory investigating commission, based on investigation of actual conditions and study of scientific and medical opinion that night work by women in factories is generally injurious and ought to be prohibited."

The Effect of Local Conditions.—In a country as large as ours physical conditions, usage, opinion and all the surrounding circumstances, so important in the determination of the necessity and therefore the validity of a statute claimed to be for the public advantage, vary greatly in its widely separated sections. It cannot therefore be assumed that there is any one standard which can be set for the entire country in accordance with which all these questions should be decided; the local conditions must be studied and the question in each case settled in the light of these conditions. This fact the Supreme Court of the United States has repeatedly recognized. Thus in holding that the physical conditions in California may well make it for the public advantage there to take water rights for the purpose of furnishing water to irrigate privately owned land, the court says:[9]

"It is obvious . . . that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned.

"To provide for the irrigation of lands in States where there is no color of necessity therefor within any fair meaning of the term, and simply for the purpose of gratifying the taste of the owner, or his desire to enter upon the cultivation of an entirely new kind of crop, not necessary for the purpose of rendering the ordinary cultivation of the land reasonably remunerative, might be regarded by courts as an improper exercise of legislative will, and the use might not be held to be public in any constitutional sense, no matter how many owners were interested in the scheme. On the other hand, in a State like California, which confessedly embraces millions of acres of

[9] Fallbrook Irrigation District v. Bradley, 164 U. S. 112 (1896).

arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power."

In a similar case [10] the same court in recognizing the importance of local custom and opinion in the right determination of such questions, says:

"When we come to inquire what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden we find no agreement, either in reasoning or conclusion. The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question. The determination of this question by the courts has been influenced in the different states by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people. In all these respects conditions vary so much in the States and Territories of the Union that different results might well be expected. . . . The propriety of keeping in view by this court, while enforcing the Fourteenth Amendment, the diversity of local conditions and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that State, is expressed, justified, and acted upon in *Fallbrook Irrigation District v. Bradley,* ub. sup., *Clark v. Nash,* ub. sup., and *Strickley v. Highland Boy Mining Co.,* ub. sup."

Province of Legislature and Court.—In order to understand fully the decisions of the courts with regard to the limits of powers like the police power and the power of eminent domain, it is important to keep in mind the respective provinces of the legislature and the State and United States Courts in the decision of such questions.

In theory the legislature and the courts are separate and coördinate departments of government. It follows that the courts, in passing upon a legislative act, cannot inquire into the motive of the legislature in enacting it nor the wisdom of the course it chose to pursue, but only into its power to act as it did, leaving it entirely to the legislature itself to determine the time, manner and occasion of its exercise. Nor have the courts the right lightly to overrule the decision of the legisla-

[10] Hairston v. Danville and Western Railway Co., 208 U. S. 598 (1908).

ture; on the contrary the court, before declaring the statute void, must be convinced of its invalidity beyond a reasonable doubt. This principle is stated by Chief Justice Marshall in a leading case on the subject [11] as follows:

"It is but a decent respect to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt."

The same principle is expressed by the same justice, perhaps with more accuracy, in another connection.

"It has been truly said, that the presumption is in favor of every legislative act, and that the whole burthen of proof lies on him who denies its constitutionality." [12]

Attitude of United States Courts toward State Laws.—The attitude just stated is, in theory at least, that of the courts, both state and national, toward the acts of state and national legislatures. Where the United States Courts are reviewing decisions with regard to state statutes and constitutions, especially where the question of what is a public use or what tends to promote the general welfare, is involved, this attitude is even more pronounced; for the local conditions, which are so important in the decision of these questions, are presumably better known to the local authorities than to the justices of the United States Courts. For this reason the declaration in a state statute or constitution that a given use of property is a public use or a given regulation of property is for the promotion of the general welfare, especially if held valid by the courts of that state, has great weight with the United States Court. This principle by which the courts of the United States should be guided, the Supreme Court of the United States has repeatedly stated. Thus in another part of an opinion already quoted [13] that court says:

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[11] Ogden v. Saunders, 12 Wheaton (U. S.) 213 (1827).

[12] Brown v. Maryland, 12 Wheaton (U. S.) 419 (1827); for a late case citing many others to the same effect, see Erie R. R. v. Williams, 233 U. S. 685 (1914).

[13] Fallbrook Irrigation District v. Bradley.

"The Supreme Court of California has held in a number of cases that the irrigation act is in accordance with the state constitution, and that it does not deprive the land-owners of any property without due process of law; that the use of the water for irrigation purposes under the provisions of the act is a public use, and the corporations organized by virtue of the act for the purpose of irrigation are public municipal corporations organized for the promotion of the prosperity and welfare of the people. *Turlock Irrigation District v. Williams,* 76 California, 360; *Central Irrigation District v. De Lappe,* 79 California, 361; *in re. Modera Irrigation District,* 92 California 296.

"We do not assume that these various statements, constitutional and legislative, together with the decisions of the state court, are conclusive and binding upon this court upon the question as to what is due process of law, and, as incident thereto, what is a public use. As here presented these are questions which also arise under the Federal Constitution, and we must decide them in accordance with our views of constitutional law. . . .

"The people of California and the members of her legislature must in the nature of things be more familiar with the facts and circumstances which surround the subject and with the necessities and the occasion for the irrigation of the lands than can any one who is a stranger to her soil. This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of the facts which surround the subject in their own State. For these reasons, while not regarding the matter as concluded by these various declarations and acts and decisions of the people and legislature and courts of California, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the deliberate judgment and matured thought of the courts of that State on this question." [14]

In accordance with this principle the Supreme Court of the United States has said:

[14] See also Welch v. Swasey, 214 U. S. 91 (1909), where the court says it "feels the greatest reluctance in interfering with the well-considered judgments of the courts of a State whose people are to be affected by the operation of the law. The highest court of the state in which statutes of the kind under consideration [viz. statutes regulating the height of buildings in cities] are passed is more familiar with the particular causes which led to their passage (although they may be of a public nature) and with the general situation surrounding the subject-matter of the legislation than this court can possibly be. We do not, of course, intend to say that under such circumstances the judgment of the state court upon the question will be regarded as conclusive, but simply that it is entitled to the very greatest respect, and will only be interfered with, in cases of this kind, where the decision is, in our judgment, plainly wrong."

"We therefore content ourselves with saying that while this court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the State whose people are directly concerned, that *it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare.*" [15]

In applying this same principle specifically to the power of eminent domain the same court calls attention to the fact that:

"No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws. . . . We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for which land could be taken by the right of eminent domain. The cases cited, however, show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people. . . . It remains for the future to disclose what cases, if any, of taking for uses which the state constitution, law, and court approve will be held to be forbidden by the Fourteenth Amendment to the Constitution of the United States." [16]

Much uncertainty has existed in the law of this country with regard to those rights which have always been regarded as most important, such as that of liberty, equality before the law, property and due process of law. There are two main reasons for this unfortunate fact: first, the litigant is entitled to invoke the protection of the guaranties of both the national and state constitutions, and these guaranties, although dealing with the same fundamental rights, often vary both in form and in substance in the various constitutions; so that it is difficult to determine whether and to what extent cases with regard to the same general subject in different jurisdictions are in

[15] Cusack Co. v. Chicago, 242 U. S. 526 (1917). The italics are the author's.

[16] Hairston v. Danville & Western Railway, 208 U. S. 598 at 607 (1908).

accord or in conflict. Second, until recently appeals in such cases from the state decision to the Supreme Court of the United States, by which alone such doubts and differences can be eliminated, were permitted only in those cases in which the state provision was upheld by the state court. By a recent change in law [17] appeals are now allowed whichever way the state court decided the question, and in so far as uncertainty was caused by this phase of the law it may be expected with time to disappear.

It is generally conceded that the decisions of the Supreme Court of the United States have been more favorable to measures intended to promote social reform than those of the highest courts of the individual states.[18] This is due in part, no doubt, to the fact that as a rule the members of the Supreme Court of the United States, chosen from the entire country, have had a wider and more varied experience than the judges of the highest courts of any one of the states; but in part it has been because heretofore invariably, in cases of conflict of opinion in such questions, only the decisions sustaining state action have come before the United States Court for review, and these decisions were supported by the strong presumption in favor of the action of the state authorities.

Difference between Police Power and Eminent Domain.—For a statute or other governmental act to be a valid exercise of the power of eminent domain or of the police power, it is evident from what has already been said that it must in either case tend to promote the public health, safety, morals or general welfare. What, then, is the line of difference between these two powers? The analysis of the cases seems to show that it is largely one of degree. Is it reasonable and proper, under all the circumstances, that the public good sought should be attained without compensation to those whose rights are to be limited to this end? If, on the whole, those affected are benefited by the measure, if the right surrendered can no

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[17] See U. S. Comp. Stats., 1916, Vol. 2, Sec. 1214; (Judicial Code, Sec. 237 as amd.)

[18] See on this subject, Goodnow, *Social Reform and the Constitution* (the Macmillan Company, New York, 1911); especially pp. 329 ff.

longer, in the light of advancing public opinion, be retained in its fullness by its present possessor, if the sacrifice to him is slight or if the number affected is great, so that compensation is impracticable—in all such cases compensation is not provided for; otherwise the law demands it. In the decision, history, custom, opinion, as well as surrounding circumstances, play their part.

PART II

PLANNING THE CITY AS A WHOLE

The City Plan.—Since the purpose of city planning is the attainment of unity in city construction, there must be, in all the steps of city construction worthy the name of city planning, either definitely on paper or more vaguely and variably in the minds of the makers of the city, a plan, in outline at least, of the city as a whole, to which any part of that planning, however small, shall relate. The creation of such a plan, covering the entire area within the city's sphere of influence, is the first task of the city planner, to be followed from time to time, as necessity arises, by the planning of details, extensions, and such modifications of existing features as unforeseen changes or further experience and study seem to dictate.[1]

Content of Plan.—What, then, should the plan contain? The complexity of city life is great, the factors of its physical development, numerous. In order to secure unity, planning should include and harmonize as many as possible of these factors, public, semi-public and private, such as the systems of streets with their building lines or set backs, the waterfront and its improvements, the parks and other public open spaces, the public and semi-public buildings and their sites, the transportation systems, both local and long distance, with their respective freight and passenger stations and terminals, the gas, water, electric and similar public utility systems, the subdivision of building land and the regulation of the height, area with relation to the size of lot, and use of structures on it. There is more or less adequate precedent for the inclusion of all the above features in a city plan in this country.[2]

[1] With regard to the limitation, for practical reasons, of the field of city planning, see p. 1, note 2.

[2] See p. 562, note 32.

The entire urban area, however, need not be planned in detail. Thus spaces for public buildings and parks should be reserved, to be devoted to more specific uses and laid out as required; in the newer parts of the city only the principal streets need be fixed, leaving the minor streets to be filled in from time to time as the necessity for them arises; and, beyond the present city, the city of the future may be left unplanned except for the laying out of the main thoroughfares connecting the city with the cities and villages outside, and, perhaps, the imposition of provisional building and zoning regulations for the areas between them.

Partial Planning.—Very few cities in this country have comprehensive city plans, although in many of them certain features have been thought out and executed with care and with good results. This partial method of planning is open to grave criticism. New York, for instance, built an extensive system of subway and elevated transportation to relieve congestion in the older parts of the city, which, for lack of zoning restrictions, has been instrumental in adding to the city new congested areas without greatly relieving those already in existence. Nevertheless partial planning is not necessarily a mistake. The American public is not educated to the necessity of a comprehensive plan, but is sometimes alive to the advantage of some one feature of such a plan, as, for instance, transportation or zoning; and the planner, unable to do what he would, must do what he can. In such cases, however, the need of a general plan should always be kept in mind, and as an incident to the smaller task, as much of the larger undertaken as is feasible. This is in fact the practice of wise city planners; for instance, all good zoning is based on preliminary surveys, which are partial planning studies.

Enforcement of Plan.—The city plan, in order that the many features included in it may in their development be made to conform to it, must be enforced. These features are widely different in their nature, and the measures to be taken to secure this conformity must vary accordingly. The public features, such as the highways and open spaces, are constructed by the city, or, if built by private persons, become public only by ac-

ceptance by the city; and the city, by controlling its own acts, can see to it that to this extent these features are in accord with its plan. The semi-public features, such as the privately owned utilities, are planned and constructed by private interests but their location, in so far as it is on, over or under city property, is usually subject to the city's consent, which may be made dependent upon conformity to the city plan.[3] The improvements of private land for private use are made by the private owners of this land. To some extent these improvements may be controlled indirectly by the planning of the city's public features, to some extent directly by building and zoning regulations, which are a part of the city plan. The legal right of the city to pass such regulations seems clear. This subject is taken up fully in that part of this work devoted to the planning of the private features of the city.[4]

A measure of public control over land which is, and is to remain, in private ownership and use is essential not only to the regulation of its planning for such use in the public interest, but also to the carrying out of the public features of the city. If feasible the city could insure the possibility of the construction of its public features as planned by purchasing the land needed for them; but prudent planning must always anticipate present needs by many years. Cities, for lack of the necessary funds, seem never able to purchase more land than is required for the immediate future; and to attempt to assess the cost of improvements on land so long before these improvements are needed would be most unjust. Unless, therefore, the city can, by some method, make adherence to the public features of the plan binding upon the owners of the land affected by it, this land is sure to be used in ways which will make it very expensive and therefore practically impossible, when the time comes, to construct these features as they were originally planned.

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[3] The state also has the right to grant or refuse a charter to a utility and to amend its charter; and also to prescribe, within certain limits, the character of service and the rates to be charged for it. A portion of this power the state usually delegates to the city; and could delegate more. All these powers could be used to obtain conformity to the city plan.

[4] Part IV.

This the history of many American cities only too clearly proves.[5]

Foreign Methods and American Attempts to Attain Similar Results.—In foreign countries where city planning has been most successful, adherence by the land owners to a plan of streets, and in some cases a few of the other main features, of the future city is secured either by forbidding the land owner, between the time of the official adoption of the plan and the taking of his land, to make any improvements likely to interfere with the execution of that plan or by providing that when subsequently his land is taken, he shall receive no compensation for any such improvements.[6] This system has been in operation for many years, not only in Roman Law countries, but in England and Canada, whose laws and traditions are so like our own; and has not been found to be unjust to the land owner. The street is essential to the land owner in the profitable use of his land. The only right of which the plan deprives him is the right to build in the bed of mapped streets between the time when the plan is adopted and the time when it is carried out. In the vast majority of cases this right is worthless both because if the plan is a good one it indicates where the street and the building should be for the best interests of the land owner and because if the plan is carried out seasonably the street will be built before there is an economic demand for the building.

The need of protecting planned streets from the encroachments of land owners has always been appreciated in this country, and, at various times many of our states have passed laws for that purpose. Everywhere in the United States, however, except in Pennsylvania, these laws have been held to be a taking from the land owner of a right of use in his land and, therefore, to be contrary to the provision of our Constitution that

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[5] See the report of Dr. Robert H. Whitten, at that time Secretary of the Committee on the City Plan of the Board of Estimate of New York City, to that committee, dated November 20, 1917, on the *Erection of Buildings within the Lines of Mapped Streets.*

[6] Temporary structures, etc., are therefore usually permitted, and there are other modifications in various jurisdictions of the strictness of the rule; see pp. 30 and 453, ff.

no man shall be deprived of property for a public use without just compensation.[7] The increased interest in city planning within recent years in this country has revived and strengthened the demand for some method of establishing the street plan on a secure basis, as is done abroad; and many suggestions have been made for the accomplishment of this result in a constitutional manner. It has been proposed that the city, when the plan is adopted, purchase or condemn an easement or option in the land, to acquire it, when needed, at its unimproved value; but the expense of the purchase of this right, with the proceedings to acquire it, added to the expense of taking the land, later on, would unquestionably make the land cost the city too much, and laws authorizing cities to adopt such a course would remain a dead letter.[8] It has been suggested that the land owner, intending to improve land in the bed of mapped streets, should be required to give the city six months' notice, within which to acquire the land; but this, instead of protect-

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[7] See report just cited (*Erection of Buildings within the Lines of Mapped Streets,* Dr. Robert H. Whitten, November 20, 1917). The law is settled to the effect as stated in the text everywhere in the United States where the question has arisen, except in Pennsylvania. The cases are given in Lewis, *Eminent Domain,* 3d ed., sec. 226; Nichols, *Eminent Domain,* Sec. 101 (at p. 282); See also Windsor v. Whitney, 95 Conn. 357 (1920), considered on page 36 of this work.

Of interest in this connection is the dictum in State v. Carragan, Collector, 36 New Jersey Law Reports 52 (1872) that "If the improvements should be made in bad faith, with intent to throw an undue burden on the public, another element would enter into the consideration of the question which might, perhaps, produce a different result"; but see, Matter of City of New York (Briggs Avenue), 118 Appellate Division Reports (N. Y.) 224 (1907); and notes on same, 36 L. R. A. N. S. 273, and 17 Annotated Cases 1034.

Lewis, in his book on *Eminent Domain,* Callaghan and Co., Chicago, 3d ed., 1909, Sec. 226, Note 23, says, in explanation of the Pennsylvania decisions:

"Such an Act was held valid in New York on the ground that it was passed before there was any limitation in the Constitution of that State upon the power of eminent domain, and compensation for improvements placed within the lines of a proposed street was denied, although the street was not actually laid out until seventeen years after the map was made. Matter of Furman Street, 17 Wend, 649. This case was followed in Pennsylvania without noticing the ground on which it rested. Forbes Street, 70 Pa. St. 125." See in this connection People ex rel N. Y. C. & H. R. R. R. Co. v. Priest, 206 N. Y. 274 at 288 (1912).

[8] There is such a law in Connecticut for the planning of towns; Revised Stats. 1918, Sec. 391-396. There are also laws for zoning by eminent domain; see Tables of Statutes.

ing the city, would furnish the land owner altogether too easy a method of forcing the city to buy his land at his pleasure, instead of at the pleasure of the city.[9]

In a number of states laws exist which provide that the owner of land, wishing to lay out streets with lots abutting on them for sale, shall submit his subdivision to the city for approval before the plan shall be recorded; and also forbid utilities in streets until such approval is obtained.[10] The private street, laid out by the land owner, all too often for his immediate profit, with no regard for the interests of the city as a whole or those of the people who are to live on the tract in question, while by no means the only offender against the city plan, is probably the commonest one; and when the lots on such a street are sold to innocent purchasers and houses built on them, the city is practically forced to accept the street as a part of its public system, giving up its own plan in that locality; the only alternative seeming to be to allow the street to remain in private control,[11] thus continuing one evil without lessening the others. The provision for approval as a prerequisite to record is effective; it is impossible in this country to sell land without a record title. The provision is also constitutional;[12] record being not a right but a privilege which the law, for reasons of public policy, may withhold.[13] Evidently such a provision can be used to the best advantage only in connection with an accepted city plan, as otherwise the planning of any given plot would not be related to the plan of other tracts of land and of the city as a whole.

Useful as are the laws providing for the approval of the

[9] See the report on the *Erection of Buildings within the Lines of Mapped Streets* already referred to; and for a more radical suggestion, see "A Survey of the Legal Status of a Specific City in relation to City Planning" by Edward M. Bassett, in the *Proceedings of the Fifth Conference on City Planning* (Chicago, 1913), pp. 46 at 48.

[10] For precedents see pp. 32, 578, 583, 587.

[11] Unquestionably the city has the legal right to condemn the land for its own system of streets regardless of the existing private streets, and the buildings abutting on them; but it would be seldom indeed that any city would exercise such a right.

[12] Bauman v. Ross, 167 U. S. 548 (1897).

[13] See cases cited in *18 Corpus Juris*, p. 247 (Sec. 186) and 248, note 65, (a); also State v. Register of Deeds, 26 Minn. 521 (1880); Van Husan v. Heames, 96 Mich. 504; *Contra*, State v. Moore, 7 Wash. 173 (1893).

subdivisions of owners desiring to sell land, as a prerequisite to record of the deeds, they do not prevent the owner who does not wish to sell from improving his land in such ways as often practically force changes in important features of the plan, and in some cases their entire abandonment; as, for instance, by encroaching upon a mapped street, or building a factory or a row of costly houses entirely across it.[14] In order that the plan may be adequately guarded its main features must be protected by the police power of the state. It has therefore been suggested that an amendment to our state constitutions be urged giving cities the right to adopt plans binding land owners, as in Pennsylvania. At best, such amendments could be passed only after a long struggle; and it is to be feared that they would be held by the Supreme Court of the United States (which has not as yet passed on the question) to be contrary to the federal Constitution. It is true that with proper city planning a good plan will be made for undeveloped territory and will be carried out seasonably; but in this country the probability of good administration is not regarded as a sufficient safeguard against injustice in exceptional cases, as it is abroad. And there are many cases, especially in portions of the city already more or less built up, where injustice might be done. Take for instance a lot, all or an undue portion of which lies in the bed of a future street. The owner has nothing to gain by the street; and if, as often happens, its construction is delayed beyond the time when the lot might with profit be built up, the owner for many years must pay taxes on the lot, but cannot get any return on it. Again, suppose a deep lot on an existing street with a factory on the front portion of the lot and a proposed street planned to occupy its rear portion. The entire lot would hold with advantage perhaps two additional factory buildings. If the owner wishes to construct one such building, he can put it in the middle of the lot, and there is no loss to him in depriving him of the use of the bed of the mapped street; but if, in course of time, he needs a third building, the only land for it is the land devoted to the future street; and

[14] See the *Report on the Erection of Buildings within the Lines of Mapped Streets* just referred to.

it is unjust to deprive him of the only use he can make of that land for many years. It is no answer to his claim of damage that when the rear street is built his land will be benefited, for under proper laws he must pay for that benefit when it comes. And the city may change its mind and never build the street; in spite of the fact that for years it has kept it on the map.

A New Method of Protecting the Plan.—As a method under the police power, of making a city plan of streets and perhaps a few other features binding upon property owners which, it is submitted, would be just to them and valid under our constitutions, it is suggested [15] that municipalities shall be authorized by state law to adopt plans binding upon them until amended in due form. If a land owner desires to locate an improvement in the bed of a mapped street or within mapped building lines (or perhaps on land destined, by the plan, for a small park or playground, or the site of a public building) he shall apply, in the building permit, for permission to locate an improvement contrary to the provisions of the city plan; and when, ultimately, the land is condemned he shall recover no damages for the improvement if it is so located without permission. The city, through its building department or other proper authority, shall grant this permission only when its refusal will unavoidably do the land owner substantial economic injury and in this connection shall take into consideration the possible uses of other land in the neighborhood belonging to the same owner and the possibility, in whole or in part, of changing the improvement or its location.

From the decision of the building department refusing permission to locate contrary to the city plan, there shall be an appeal to a board of appeals, who shall have the power to grant the permission with conditions calculated to lessen or altogether to avoid the expense to the city due to improvements when, later, the city condemns the land; no appeal to the courts

[15] The suggestion was first made by the author at the session of the National Conference on City Planning held at Pittsburgh in 1921; at which time Edward M. Bassett, Esq., suggested valuable improvements which, with his permission, are here adopted; see the *Proceedings* of the Conference, and an article by the author in the *National Municipal Review* for July, 1921, entitled "Enforcing the City Plan."

being allowed until after resort to the board of appeals. This provision would both mitigate most if not all the hardship which the law might otherwise cause the land owner in special cases and make the law less vulnerable before the courts.[16] In

[16] A draft of a statute along the lines suggested in the text was drawn up by Mr. Bassett, and is given below. For the sake of definiteness it was made as an amendment to the New York Charter. It should be noted that this charter provides that in the construction of all the features legally a part of the city map the city shall follow that map, except as amended in due form. For a reference to these provisions, see p. 154, 185 of this work.

The suggested act is as follows:—

AN ACT

To amend the Greater New York charter in relation to the official map and plan, to prevent buildings in streets shown on such map and plan, and to empower the board of appeals to grant building permits in certain cases.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Sec. 1. Chapter VI of the Greater New York charter is hereby amended by adding after section 442 a new section to be known as section 442a, as follows:

Sec. 442a. Such map and plan is established to conserve and promote the public health, safety and general welfare. Accordingly for the purpose of preserving the integrity of such map and plan no permit shall hereafter be issued for any building in any street laid out in such map and plan, provided however that, if the land within such mapped street is not yielding a fair return to the owner, the board of appeals shall have power in a specific case to grant a permit for a building or buildings which will as little as possible increase the cost of opening such street or tend to cause a change of such map, and such board may impose reasonable requirements as a condition of granting such permit, which requirements shall inure to the benefit of the city. Before taking any action authorized in this section the board of appeals shall give public notice and hearing.

Sec. 2. Section 718d of Chapter XIV-A of the Greater New York charter is hereby amended so that it will read as follows:

Board of Appeals. Sec. 718d. The appointed members of the board of standards and appeals and the chief of the uniformed force of the fire department, exclusive of the other members, shall hear and decide appeals from and review any rule, regulation, amendment or repeal thereof, order, requirement, decision or determination of a superintendent of buildings made under the authority of title two of chapter nine of this act or of any ordinance or of the fire commissioner under the authority of title three of chapter fifteen of this act or of any ordinance, or of the labor law. They shall also hear and decide all matters referred to them or upon which they are required to pass under any resolution of the board of estimate and apportionment adopted pursuant to sections two hundred and forty-two-a and two hundred and forty-two-b of this chapter. *They shall also hear and decide applications for permits for buildings in streets laid out in the official map and plan of the city as provided in section 442a of chapter VI hereof.* No member of the board shall pass upon any question in which he or any corporation in which he is a stockholder or security holder is interested.

both these respects a board of appeals would in this connection render a service analogous to that which it has so admirably performed under zoning laws.[17]

Hearings on appeals shall be before at least five members of the board of appeals, and the concurring vote of five members of the board of appeals shall be necessary to a decision.

The words board of appeals when used in this chapter refer to the said appointed members of the board of standards and appeals and the chief of the uniformed force of the fire department, when acting under the powers conferred by this section.

NOTE:—New matter in section 718d is in italics.

[17] In support of legislation for the establishment and protection of the city plan under the police power the late case of Windsor v. Whitney (95 Conn. 357; 1920) may be cited. In 1917 the State of Connecticut passed an act (Special Laws, 1917, No. 133; p. 827) for the planning of outlying parts of the town of Windsor, in the outskirts of the City of Hartford. The act provides for the creation of a planning commission with power to establish a street and building line plan for this territory; gives the land owner an appeal to the courts if he considers the plan for his land unreasonable, and forbids land development, the sale of lots and the erection of buildings not in conformity with the officially adopted or sanctioned plan. No compensation for the establishment of the plan is provided for.

In his brief in support of this act the attorney for the town of Windsor says:

"We anticipate that the defendants will claim that a man has a right to build and use private ways on his own land, that that is all that the present scheme amounts to, and that the State cannot interfere with this right without compensation. Without denying the right of a land owner to maintain private ways on his own land which do not affect other property, directly or indirectly, we shall show that this is not the situation involved in the present case.

"Section 11 of this act provides that the provisions of the act shall not apply to the Windsor Fire District, in other words, to the village of Windsor. The growth of the City of Hartford toward the North is extending into the southerly part of the Town of Windsor and land development schemes like the one engineered by these defendants are now in progress and probably will be more numerous in the immediate future. The present act is intended to properly provide for the conditions which prevail in the outskirts of a city.

"The complaint states that the defendants are endeavoring to sell a large number of building lots. The two parallel streets are 800 feet long. If the building lots are 50 feet wide, the usual width, there will be 16 building lots on each side of each of these streets, a total of 64. In addition there will be building lots on the cross street. It is obvious that in the natural course of events there will be a large number of houses erected on this tract within a few years and that a considerable number of people will live in them. This is not only probable but is the result which the defendants contemplate and are trying to bring about. It is respectfully submitted that this enterprise is one in which the State of Connecticut has a legitimate interest.

"If within the next few years this tract contains numerous dwellings and a considerable population, it will become the duty of the State of Connecticut and its agent, the Town of Windsor, to provide fire pro-

Illustrations of the service which a board of appeals could render in the administration of this provision of the planning law are numerous and varied; and of these illustrations I will cite three.

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tection and police protection. In the interest of safety and morality lights must be provided. In the interest of health a sewer must be installed. Water must be furnished. The children must be provided with school facilities. In caring for all these essentials the State must use streets. We all know from experience that the normal result of such an enterprise is that the town sooner or later takes over such streets as public highways. If it does, grading, curbing, drainage, etc., become necessary and expensive. But whether these streets become public highways or not, the above public duties and many others will be eventually thrown on the Town of Windsor if the project of the defendants becomes a success.

"We think further that the State and its agent, the town, are fairly entitled to take into consideration the relation of the tract in question to the general lay-out of highways in the town, both those already existing and such highways as the future is likely to call for in the neighborhood. It is obvious that if one land owner lays out streets according to his notions and the adjoining owner adopts an entirely different scheme, when the town eventually takes both groups of streets, the performance of its public functions will be greatly complicated. Wide, straight streets are not merely beautiful—they are the best streets for practical purposes. It is certainly not unreasonable that the town should have some control over the matter in advance.

"It may be contended that the time for the town to take a hand in the matter is when the necessity for actual public care arises. But we respectfully maintain that the State is fairly entitled to look forward to probable conditions contemplated by the parties in interest with proper foresight for its future duties and that this is supported by common sense and by the authorities which we have cited above. It is ridiculous to say that the State must stand by and watch the defendants and their vendees build up a considerable community and then step in and straighten out the street problems at greatly increased expense to both the State and the parties then concerned. The prudent and sensible thing for the State to do is to have its say now. This is what the present act seeks to accomplish. It is clear from the above citations that the police power of the State would enable it to handle the situation when the community has once come into existence and we think it equally clear that the police power of the State is broad enough to enable it to anticipate the future conditions indicated by the situation."

In sustaining the Act, the Court says:—

"Unless this regulation can be supported as a legitimate exercise of the police power, the Act must fall. A town commission plan such as this Act contemplates is distinctly for the public welfare. Its theory is to lay out streets when and where the public need them, and of adequate width to meet the requirements of the community and of transportation. In such a plan each street will be properly related to every other street. Building lines will be established where the demands of the public require. Adequate space for light and air will be given. Such a plan is wise provision for the future. It betters the health and safety of the community; it betters the transportation facilities; and it adds to the appearance and wholesomeness of the place, and as a consequence it

If a land owner desires to erect a brick structure in the bed of a mapped street, the board of appeals could offer to authorize a wooden building, pointing out that such a building could be amortized in a given number of years, with a fair return to the land owner on the value of his land. No court could hold that (in the absence of other complications) the land owner was rightly aggrieved to whom such an offer was made, even if he could obtain a larger amount by violating the city plan, contrary to the general interest; for if the return is a fair one he is not unjustly deprived of his property.

If a building were proposed a part of which only would project into the future street, the board of appeals could offer to consent to a building of which the projecting portion was only one story high; backing up the proposal by plans showing the suitability and yield of such a building in such a location.

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reacts upon the morals and spiritual power of the people who live under such surroundings. The demands of a large city may excuse congestion, but in a small city or a country town there is no excuse for such living conditions. But unless some authority controls and regulates the land development, we may look for too narrow streets, too few or no building lines, and buildings erected, unstable in character, unsuitable in material, and inappropriate in construction. Our large communities all have their examples of the unregulated layout of streets and building lines and buildings; of instances of land development so as to yield the last penny to its promoters regardless of the public welfare; of community eyesores; of streets made over, whole sections changed, because at the beginning no reasonable provision was made for the safety, health or welfare of the community.

"Such an Act as this is conceived in public wisdom and serves great public ends. Courts will be reluctant to destroy it and with it its beneficent purposes." 95 Conn. 362-3.

It should be noted that there is a material difference between the Connecticut statute and the statutes for the establishment of city plans sustained by the courts of Pennsylvania and held invalid in all the other states in which the question has been raised. The Connecticut statute, unlike the others, provides for a modification of the plan to suit special circumstances and remove special hardships, granting the land owner feeling himself aggrieved an appeal to the regular courts for the purpose; and it is for this reason that the Connecticut judges, in the case under examination, in which the owner did not avail himself of this method of relief, are justified in assuming that "the regulations as to the lay out of the streets and building lines, and as to the issuance of building permits, are reasonable for that section and location." It may well be that, under Connecticut law and procedure, provisions for modification of the plan by appeal to the regular courts, especially in administering an act which applies only to outlying territory, would work well; whereas under acts to be made applicable also to city land, provisions for a board of appeal, more or less as suggested in the draft act given above, would be more appropriate.

If the city intended to build the street within, perhaps, five years, the board could be authorized, with the consent of some proper city authority, to agree with the land owner that the city would build it within that time. This agreement would usually make it certain that the location of the building with relation to the future street, so soon to be built, was the most profitable one, especially if the building was to be expensive.

A provision, under the police power, making a few of the essential features of the city plan binding upon the land planned is essential to the success of city planning in this country. The provision here suggested would seem to accomplish everything which is secured by the provisions, for the same purpose, of foreign laws, by methods already familiar in this country, and therefore more likely to win the approval not only of city planners, but of our courts.

The Control of City Development.—The purpose of city planning is the attainment of unity in city construction. To that end the power to establish and protect a city plan is necessary but not sufficient. In addition some measure of power to determine the order and time of development of outlying land is necessary. In this country, and in most parts of the British Empire, the land owner may convert his agricultural land into prospective building lots wherever and whenever he pleases. The result is often a premature subdivision of land, with a resulting economic waste, and always an undirected city growth.

German Methods of Control.—The development of outlying land is controlled, to a considerable extent, in some of the German states by imposing upon it zoning regulations allowing only low, detached residences, covering a small percentage of the lot, in other states by forbidding all subdivision of land and construction of permanent improvements until the city decides that the land should be developed, and establishes a plan and building or zone regulations, thus fixing the direction and character of city growth.

In England, the English speaking colonies, and this country, vacant building land abutting on more or less improved streets, with many if not all the city utilities, is to be found here and there throughout the city, the amount of it increasing

greatly as the outlying portions of the city are reached, and the city gradually and irregularly fades out into the open country, or, sometimes, jumps considerable areas in its progress. In continental European cities the development is more uniform, with fewer vacant lots, especially as the city's outer edge is approached, where abruptly the city ends and the open country begins.

In Germany this tendency toward uniform development is strengthened by the German method of "city extension," enforced by prohibition of improvements in advance of it;[18] new streets there being planned and constructed only in a narrow strip of land immediately beyond the solidly built existing city, as immediate necessity for building land from time to time arises, building lots being forbidden elsewhere. The strips of land thus improved do not necessarily, or usually, extend around the city, but only in the directions where growth is considered most advantageous. It should be noted that the city plan for the purposes of "city extension," since it covers only areas necessary for immediate use, is usually supplemented by another plan indicating the city's proposed lines of growth for many years to come.

Our "laissez faire" method of city construction, the German orthodox planner objects to, first, because it unnecessarily swells the expenses of administration, such as police, postal delivery, etc., and of furnishing the utilities, such as gas, water and transportation; secondly, because it increases the cost of land development and ultimately land prices and rents by adding to them interest and maintenance charges for unused and partly used improvements; thirdly, because it hastens unduly the turning of agricultural land into building lots which remain unused for long periods, thus again augmenting land prices and rents. Land speculation, however, still continued in Germany in 1914, before the War, and many German economists thought that the limitation of building to a narrow strip of land created monopoly values.

It has been pointed out that the vacant lot furnishes light and air to structures on neighboring land, and tends to lessen

[18] There are other causes for the solidly built German city; see p. 366.

congestion. A more uniform development, however, may be secured by limitations on the height and area of structures, by zones, if desired, and thus light and air and relief from congestion obtained.

A Suggested Canadian Method of Controlling City Development.—The German method of controlling city construction just referred to, would be impossible in this country not only because it would be held to be a taking of property rights without compensation, but because it would be considered unjust. In Canada a method of obtaining in a measure at least the advantages of the German system without its disadvantages, has been independently worked out.[19] In some of the Canadian cities land booms, now partially at least collapsed, have unduly stimulated the cutting up of agricultural land within city limits into building lots. Some of these cities are making rules [20] allowing these owners to classify this land as

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[19] See on this subject an article by Thomas Adams in the *National Municipal Review* for March, 1919, entitled "Town Planning in Relation to Land Taxation."

[20] Typical of these regulations is the following:

CITY OF EDMONTON

Resolutions passed by the City Council at a special meeting, September 29, 1919, dealing with the problem of assessment and taxation on outlying subvisions in the City of Edmonton.

1. That no portion of the City be excluded from the present limits of the City, except certain portions which may be excluded by the City for topographical or engineering reasons.

2. That the City be divided into an inner or residential area, and an outer or agricultural area.

3. That the line separating and defining these two areas be fixed by the City with a view to the development of the City at the present day and the probable development in the near future, this boundary as so defined to be fixed by the Utilities Board and subject to change only upon recommendation of the city and the consent of the Board.

4. No new plans of subdivision to be allowed in the outer or agricultural area, except in cases where land is ripe for development for residential purposes, when it shall be brought into the inner area in the manner above provided before being subdivided, the idea being to encourage cancellation of existing subdivisions in the outer area by allowing reduced assessments, so soon as plans are cancelled.

5. No utilities, except as required for trunk lines or other engineering reasons to be extended into the outer area.

6. The lands in the outer area to be assessed at their real value for agricultural, horticultural or such other purpose for which they may be used provided that lands actually being used for agricultural purposes shall not be assessed at an amount in excess of Two Hundred Dollars ($200) per acre for a period of five years.

agricultural, on condition that they cancel all existing subdivision and agree, as long as this classification is retained, not to make any new subdivision. In return, the city agrees to tax the land at a low rate. It is understood that no city improvements, except such as are appropriate to agricultural land, shall be made in agricultural areas. When the owner wishes to obtain a classification of his land as building land, he must at once pay an increment tax of fifty per cent on its increased value and thereafter is liable for taxes at the regular rate. It is calculated that the city will not lose in taxes more than it saves in interest and administration; and that the present owners of the land and the final owners of it and the homes on it, will be greatly benefited, thus again benefiting the city. Such an arrangement would be entirely possible in this country in any case where it seemed desirable; for, entered into voluntarily by the land owner, it is neither unconstitutional, under our legal system, nor unjust.[21]

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7. That a reduction of not more than forty per cent. be made in the mill rate for lands in the outer area.

8. No compromise for back taxes, but an extension of the time for payment not over ten years.

9. That there be paid to the City in respect of any land located in the suburban area that may hereafter be assessed on the basis of assessment for lands in an unsubdivided state on the first sale thereof after the date of assessment on the said basis, one-half of the increase in value, if any, as shown by the sale price thereof, and the average of the assessments of the said land from the said first assessment to the said sale and on each subsequent sale thereof the same proportion of the increase in value, if any, as shown by the sale price thereof and the average of the assessments since the preceding sale, until the said land shall be brought into the urban area, or shall be assessed on the same basis of assessment as lands in the urban area, whichever shall first happen.

10. That there be a penalty or a wild lands tax imposed on all agricultural lands in the outer area not put under cultivation.

11. That the Board of Public Utility Commissioners be asked to use their powers to reduce the costs of cancelling plans of subdivisions.

[21] More or less similar to the Edmonton, Canada, rules is the system of taxation for many years in vogue in Philadelphia. In that city land is classified as rural, suburban and urban, rural land paying one-half and suburban lands three-quarters the full urban rate. It has not been the practice in Philadelphia to make any improvements in the rural areas. In many cities, as, for instance, Hartford, Connecticut, certain areas are, or at one time were, taxed as agricultural. Laws are not uncommon separating rural land from cities at the request of the owners.

PART III

PLANNING THE PUBLIC FEATURES

CHAPTER I

ACQUIRING THE LAND

The City's Need of Land.—One of the greatest needs of the modern city is land. The city requires land for its many public features, such as streets, parks and playgrounds, docks, reservoirs, sites for public buildings, and many miscellaneous uses. These features are essential to the growth and prosperity of the city, to the happiness and physical and moral health of its inhabitants; and they all require land for their construction. Probably at a moderate estimate 40 per cent of the total area of the city of today should be devoted to public uses. Unfortunately very few cities have anything like this percentage for such uses. It seems impossible for the modern city to obtain a sufficient supply of land to keep up with its ever augmenting need of it; and the more the supply lags behind the demand, the higher the land is in price and the harder it is to catch up.

The City's Difficulties in Obtaining Land.—In its efforts to obtain the land it requires the city encounters many difficulties. Usually it lacks capital for the constantly increasing plant and equipment, including land, necessary today for success in all great business enterprises; generally its methods of obtaining its income are faulty, and less productive and more burdensome than they should be; and almost invariably it does not acquire its land at a reasonable cost.

Effect of Legal Restrictions.—It is a well-known fact that public improvements cost more than similar private enter-

prises. There are many causes for this. Public officials are sometimes less honest than private administrators, or less capable, or less devoted.[1] Invariably, however, the conduct of public business is hampered by legal restrictions from which private affairs are free. This is especially the case with the purchase of land.

Price Governed by Cost in Condemnation Proceedings.—A city has the legal right to obtain land by agreement with the owner; but in this country and in England land is acquired only for a use specifically stated at the time in accordance with plans announced in advance. The owner, therefore, knows that his land is essential to the city and could usually extort an extravagant price for it, but for the fact that the city, under eminent domain, can take it without his consent. For this reason the cost of land to a municipality is its cost as obtained under the power of eminent domain; and it is only in so far as that power is suitable for the purpose that the city can obtain land at a reasonable price and, therefore, in a sufficient quantity for its needs.

Legal restrictions upon the exercise by a public body of a power like eminent domain are an expense to the public in two ways:—they decrease the power of the city to act effectively, and they increase the number of required formalities with their attendant delays and expenses. There is, however, a necessity for a measure of such restriction. A municipality, for instance, should be required to give the public due notice of its plans, and time to examine them, so that they may more surely conform to public wishes. The individual also needs protection in his private interests against the arbitrary use of governmental power. Restrictions on this and similar powers should, therefore, be imposed, but they should be examined and analyzed with great care in order that only those which are useful may be retained and that these may be made as simple as is consistent with the fulfilment of their purpose.

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[1] Lawson Purdy, Esq., for many years President of the Board of Taxes and Assessments of the City of New York, has said, "In my opinion public officials are usually more honest than private administrators, and more devoted, but often less capable."

Duplication of Constitutional Limitations.—Throughout the civilized world the power of eminent domain is very properly subject to the limitation that it shall be exercised only for the public advantage, on payment to the owner of just compensation. The power of taking private property without the consent of the owner is one from the arbitrary use of which the individual citizen should be protected. In other countries property, in common with life and liberty, seem to be sufficiently safeguarded by statute, or at most a constitutional provision, interpreted by the legislature; but in this country these rights are guaranteed by both state [2] and national constitutions, construed and upheld by the state and national courts. This duplication is easy to explain historically. The so-called bill of rights, containing these guaranties, was a valued part of the state constitutions long before the creation of the national government. The federal constitution has always defended the citizen against federal oppression, but it was not until the fourteenth amendment was passed in 1868, as a result of the Civil War, that the United States, to any extent, attempted to protect the citizen from his own state. Meanwhile, the state bill of rights had become sacred in popular estimation, and in none of the many revisions of state constitutions has it been omitted.

Time-honored as it is, there is nevertheless reason to doubt whether there is sufficient cause for the continuance of this duplication, often enabling the litigant to appeal first to state and then to national courts for relief and delay. As passed on by the Supreme Court of the United States, it is true that these provisions are more favorable to modern social reforms than

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[2] From some of the early statutes and decisions with regard to the taking of land for roads in a few of our states it might seem that there were exceptions to this rule. In these states, in early times, it was customary to give with every grant of land, a certain excess to provide for public roads. In these cases, therefore, it was not a taking without compensation to require the grantees to surrender the land for roads without payment, and the decisions allowing such a practice are not contrary to the accepted doctrine. The opinions do not in these cases always make this fact clear. For references to the statutes and the cases under them see Lewis, *Eminent Domain* (3d ed.), Sec. 674, Nichols, *Eminent Domain* (2d ed.), Sec. 204.

when construed by most of the state courts.[3] Few, however, will deny that every essential right of the individual is protected by the United States Courts; and the abolition of the bills of rights and similar guaranties in the state constitutions would certainly simplify procedure and lessen delay and expense.

The national constitution provides, in effect,[4] that private property shall be taken by authority of the United States or of any state only for public use, on payment of just compensation. Not content with this amount of protection to the private property of their citizens, or even with inserting a like protection in their own constitutions, many states have provided additional safeguards. Thus in some states compensation is required by the constitution for property which, although not actually taken, is "damaged," "injured," or "injuriously affected" by authority of the state, and in some states there are statutes to the same effect. This, as will appear in the chapter with relation to street construction,[5] is no more than just. Some states require that in all cases or in all except where the state or a municipal corporation is the taker, the compensation shall be paid, or secured, before the property is taken. This, in any event where a private individual or corporation is the taker, is a proper protection of the property owner. To some extent decisions under the simpler provisions supply the protection which these additional clauses expressly grant.[6]

Just Compensation.—The provision in the national and the state constitutions that the private owner shall be paid a "just compensation" for his property has occasioned much controversy. In the various states this clause, in this simple form, has been interpreted by the courts in various ways. In some states there are additional constitutional provisions on the subject; in others there are more or less similar statutes. These

[3] See p. 22, ff.

[4] It provides (14th amendment) that no state shall deprive any person of property without due process of law; and the cases hold that no taking without just compensation is due process.

[5] See p. 174.

[6] See Lewis, *Eminent Domain* (3d ed.), Ch. VIII. In all jurisdictions it is held that the compensation must be in money; Nichols, *Eminent Domain* (2d ed.), sec. 205.

additional constitutional and statutory provisions, in their turn, have been passed upon and interpreted by the courts. What is the result in the different states to the property-owner and the public?

Taking Entire Tract.—Where the entire tract or parcel of land of a given owner is taken, the question of what constitutes a just compensation is comparatively simple. Universally in this country it is held to be the fair market value of the land and whatever improvements there are on it. In some countries a percentage is added as compensation for the fact that the taking is compulsory.[7] In this country such is not in theory the case, although in fact juries often increase awards on this account. The subdivision of the title also may increase the amount which must be paid for the land, especially where, as in England, long leases are common, and the profits and good will of the business conducted on the leased premises, are evidence of the value of the lease.[8] It is not the land, but the interest of the various owners in the land which, in most jurisdictions, the state takes;[9] and evidently the sum of the values of these interests may exceed the value of the land itself. In this country, where long leases are rare, and profits and good will are not evidence of their value, subdivision is seldom a serious matter. It remains substantially true, therefore, that where an entire tract of land is condemned, the amount which the state must pay for it is the amount of its improved value.

In calculating the value of an entire tract the increase due to the improvement for which it is condemned is not taken into account; for it is not a part of the value of which the owner is deprived, but a gain produced at the expense of the maker of the improvement for which he should not be compelled to

[7] This, known as "Compensation for Disturbance," was formerly common in England. See Cripps, *Law of Compensation* (4th ed., London, 1900), p. 103; Ministry of Reconstruction, *Report of Committee on Acquisition and Valuation of Land for Public Purposes*, 1918, parts 1 and 2. In condemnation by public bodies it is no longer the practice; Acquisition of Land (Assessment of Compensation) Act, 1919. It is not the law or practice in Canada; K. v. MacPherson, 20 Dominion Law Reports, 988 (1914).

[8] *Ibid.*

[9] This is the law in England, and considered the better law in this country; Nichols, *Eminent Domain* (2d ed.), Sec. 118.

pay twice. Sometimes, however, this increase is brought indirectly to the attention of the jury; for unquestionably the value of the property must be based not alone on its present use, but on its suitability for any use, including, of course, that for which it is actually taken. This is one reason why awards are high. Indeed, there is a very general feeling and belief that the public usually pays too much for the land it condemns. Many suggestions for fixing rules or standards for the price of the land in condemnation proceedings have been made, few if any of which seem likely to secure a fair valuation.

Taking Part of Tract.—It is where a part of the tract of an owner is taken for a public improvement that the differences in the rules determining what constitutes just compensation are most numerous and acute. All are agreed that, in addition to the value of the part taken, the owner shall be credited with the damage, if any, which the improvement causes to the rest of his tract. Should he not also be debited with the benefit due to it from the same cause? If not, will he not receive from the public more than is due him, and a public improvement to that extent be made unduly expensive? In so far as the benefits are general there is no sufficient reason why he should be compelled to pay when the others are not, no injustice in taxing all the land owners for this element in the improvement by which all gain. To the extent, however, that the benefits which he receives are special to him, it seems manifestly just and expedient that the value of these benefits should be a charge against him in condemnation, as the assessment of local benefits makes them such in taxation.[10] This, however, is not the prevailing rule, although, with the spread of local benefit taxation, it is becoming more general.[11]

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[10] With regard to local benefit taxation see p. 363, ff.

[11] In England, neither the debit of the value of the improvement, in condemnation proceedings, nor benefit taxation, are common; but both are increasing; and both are the rule in Canada and Australia. See Cripps, *Compensation,* p. 96, and the *Report of the Commission on Acquisition and Valuation of Land for Public Purposes,* already cited. For a statement of the law in the various states in this country with references to the constitutional provisions, statutes and decisions see Lewis, *Eminent Domain* (3d ed.), secs. 687-693; Nichols, *Eminent Domain* (2d ed.), Ch. XVI. Lewis (sec. 687) summarises the law in this country as follows:

Importance of Procedure.—The property owner, if he is to be protected in his rights, must be guaranteed not only a just compensation for his land but a reasonable opportunity to obtain this compensation. Substantive rights without adequate

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"The Question of Benefits

"While the authorities are agreed that, where part of a tract is taken, just compensation includes not only the value of that which is taken, but damages, if any, to the remainder, there is great diversity of opinion as to the right to take into consideration the benefits which may accrue to the remainder by reason of the appropriation of a part to public use. In some States the consideration of benefits is prohibited by the constitution. Sometimes the statute conferring authority to condemn prohibits any deduction for benefits in estimating the compensation or damages. In the absence of any such constitutional or statutory provisions, it becomes a question of construction as to the meaning of the phrase 'just compensation' in the constitution. The decisions may be divided into five classes, according as they maintain one or the other of the following propositions:

"First. Benefits cannot be considered at all.

"Second. Special benefits may be set off against damages to the remainder, but not against the value of the part taken.

"Third. Benefits, whether general or special, may be set off as in the last proposition.

"Fourth. Special benefits may be set off against both damages to the remainder or the value of the part taken.

"Fifth. Both general and special benefits may be set off as in the last proposition.

"It will be observed that these propositions pass from one extreme to the other."

The fourth result seems to be the correct one. The arguments for it are convincingly stated in Lewis, sec. 693, as follows:

"Conclusion as to the Questions of Benefits

"The law in regard to benefits is now pretty well settled in every State, either by the decisions of its courts, or by its statutes, or its constitution. While different and conflicting rules prevail in the different States under precisely the same constitutional provisions, it is evident that there can be but one absolutely correct rule. In taking private property for public use the State acts rightfully and not as a wrong doer. It guarantees just compensation, and nothing more. In arriving at what is just compensation the matter is to be viewed in the same light as though the State had bargained with the owner for a portion of his land and had agreed to make him just compensation therefor. It is self-evident that, where a part of a tract is taken, the just compensation cannot be determined without considering the manner in which the part is taken, the purpose for which it is taken, and the effect of the taking upon that which remains. All the authorities concede this so far as damages to the remainder are concerned, and the justice of so doing may be taken for granted. But what justice is there in considering the effect in so far only as it produces damage? If a railroad is constructed through a farm and drains a valuable spring whereby the remainder is depreciated five hundred dollars, it is conceded that just compensation must include this five hundred dollars. But if, instead of draining a valuable spring, it drains a marshy tract so as to make it worth five hundred dollars more for actual use, the same sense of justice requires that this five hundred dollars of benefits should be considered."

means of defending them are of no value. This fact our constitutions recognize. Under the fourteenth amendment to the Constitution of the United States, "no state shall . . . deprive any person of . . . property without due process of law." A more or less similar provision is also contained in the constitutions of most of the states. In eminent domain this clause has been held to affect the substantive rights of the property owner, and due process must include provisions for the payment of just compensation. The main purpose of the clause, however, is to regulate procedure. It guarantees the property owner a method of obtaining his compensation calculated to obtain justice and in accordance with the spirit of our institutions and law, as shown in our history. The clause does not prescribe any particular procedure, but, on the contrary, is satisfied by a great variety of methods. There are, however, certain requisites which are essential. The courts have held that there must be provisions for ascertaining fairly the amount of compensation, for reasonable notice and for a hearing of those interested. Any procedure which fulfills these requisites is due process under these constitutional guaranties.

There has been a growing feeling of late that our condemnation procedure is not well suited to the attainment of its purpose. Frederick Law Olmsted, the well-known landscape architect and city planner, said a few years ago on this subject [12]—and there has been no considerable change in law or practice since—that he had discovered an

"astonishing variation in the practical efficiency of methods actually employed and prescribed by law or legal custom in different parts of the United States in acquiring land for public purposes, in distributing the cost of public improvements, and in other proceedings essential to the proper shaping of our growing cities to the needs of their inhabitants. Mere variation in method would be of little more than academic interest in itself, but variations that result in obstructing the path of progress in one community and clearing it in another are of large practical importance. The extent and significance of these practical variations have impressed themselves more and more strongly on the writer in the course of an extended prac-

[12] In his Introduction to *Carrying out the City Plan,* by Flavel Shurtleff, Survey Associates, Inc., New York, 1914.

tice as a landscape architect, especially in connection with the design and execution of such municipal improvements as parks, playgrounds, public squares, parkways, streets, the placing of public buildings and the improvement of their grounds. Even more notable than the variation in method and in relative efficiency has been the close preoccupation of public officials, especially in the city law departments, with the constantly recurring problem of finding the way of least resistance for navigating a specific improvement through the maze of obstacles imposed by the existing local legal situation, accompanied by an almost fatalistic acceptance of these obstacles as a permanent condition. There has been evident in most cities a very limited acquaintance with conditions and methods to be found elsewhere, and a general lack of strong constructive effort for the improvement of the local conditions and methods on the basis of general experience. Of late years, however, there has been a growing tendency to break away from this indifference and to face these problems in a larger spirit."

* * * "Feeling the importance," Mr. Olmsted goes on to say, "of stimulating and assisting such constructive local effort by calling attention to the more important of the variations in actual use [he] urged the Russell Sage Foundation . . . to provide the funds for making a systematic survey of the field."

The result was that an investigation was made by the secretary of the National Conference on City Planning, which is a necessary first step in a reform of great importance to the cause of city planning and efficient and economical city government in this country. On the subject of procedure the results of that investigation, which are here briefly summarized, are peculiarly valuable.[13]

Survey of Procedure in United States.—Procedure in the condemnation of land may be considered under two heads: —provisions with regard to notice and hearing in condemnation cases and provisions with relation to the tribunal for the decision of these cases. The hearings are either in initial proceedings or on appeal.

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[13] In spite of some changes in the law and practice cited, it remains as a whole typical of the condition existing at the present time; and it is reproduced here for the reason that nothing later at all comparable to it exists. See, however, Massachusetts Documents, House, No. 1851 (Feb., 1915) and 1750 (1916); Illinois Constitutional Convention Bulletin No. 7 (1918) and the valuable English report on *Acquisition and Valuation of Land for Public Purposes*, already mentioned.

Notice and Hearing.—In initial proceedings Milwaukee furnished an example of delays prior to the beginning of the ascertainment of the amount of compensation which is by no means unique. The following[14] were the docket entries in a normal street opening case in that city:—

"Sept. 30, 1907, first resolution of common council referred to committee.

Oct. 14, 1907, first resolution adopted by common council.

Oct. 15, 1907, first resolution approved by mayor.

Oct. 28, 1907, second resolution adopted and approved.

Feb. 17, 1908, third resolution adopted and approved.

May 7, 1908, proof of publication and service of resolution on land owners returned to court.

May 16, 1908, list of owners filed.

May 23, 1908, jury sworn and premises viewed.

June 5, 1908, jury hears evidence and returns a verdict that the opening is a public necessity.

July 2, 1908, papers in the case go to the board of public works for award of damages after the hearing of evidence."

In Minneapolis the "first hearing on the question of damages under park procedure . . . is held before five appraisers appointed by the park commissioners. The second hearing is before the park commission. At the second hearing the park commissioners consider objections to the appraisers' report on the ground either of irregularity in the proceedings or of inadequacy of the award of damages. The third hearing is before the court on the question of irregularity of the proceedings. The fourth hearing is before three appraisers appointed by the court to review the evidence and bring in a report on the question of damages. If this appraisal is unsatisfactory there may be even a fifth hearing before three new appraisers, but in the practice of the present counsel for the board of park commissioners, which has extended over several years, there has been only one instance of the court's granting this fifth hearing."

These are by no means extreme or unusual instances. In Los Angeles and Denver these proceedings ordinarily consumed a year, and in Chicago, three years. In Oregon, however, the city normally came into possession of land taken under eminent domain in two months from the filing of the petition.

The Tribunal.—The next question is that of the tribunal

[14] Taken from *Carrying out the City Plan*, already cited, p. 26, ff.

before which the amount of damages for the taking of the land is fixed. In a few states the constitution or a statute specifically gives the land owner the right to a jury trial in condemnation proceedings. As a rule, however, the right to a jury is granted in general terms, which the courts have interpreted as guaranteeing that right only in those cases where it was given at common law, and not in cases in which, like condemnation, it did not at common law exist. In all the states, therefore, except those in which the land owner is specifically granted the privilege of claiming a jury trial, a different tribunal may be created for the purpose. In the opinion of students of the subject a common law jury is not fitted to try condemnation cases, since it is apt to lack the knowledge of real estate values and the experience in handling technical evidence which are important in the tribunal which is to ascertain the compensation in land damage cases.

The tribunals provided in this country for the fixing of the amount of compensation in condemnation proceedings may be divided into three classes: (1) a special board of three commissioners, whose valuation is subject to review by the court with jury, (2) a court with jury having original jurisdiction, (3) a court without jury having original or appellate jurisdiction. The varieties of tribunal in each of these classes are great, and the differences between them and between the results they obtain are considerable. Under each one of these systems complaints of delay, incompetence, dishonesty, and useless and excessive expense are numerous and bitter. In New York State, where the special board was the rule, a constitutional amendment [15] was passed to allow those communities wishing it to introduce the system of court without jury. This was done chiefly on the demand of New York City. In the large city, commissioners do not have a thorough knowledge of local conditions as they do in smaller communities. In New York City men of ability and experience are too

[15] To Art. 1, sec. 7, adopted Nov. 4, 1913, and introduced by statutory authority in New York City, N. Y. Laws, 1915, ch. 596, repealing ch. 21, sec. 1435-1448 of the New York City charter, and adding a new ch. 21, secs. 1431-1453, thereto.

busy to give prompt and continuous service in matters outside their regular business, and the selection of dates for hearings before commissioners at considerable intervals for the convenience of commission, witnesses, and counsel, the session being usually only an hour long, resulted in proceedings dragging on for years. Courts do not try cases in this way. In New York City unscrupulous experts, by testifying to unduly high values, were able to obtain excessive verdicts. The advocates of the amendment wished to have one judge assigned to condemnation matters; who, striving for consistency in the various cases before him, would soon learn to distinguish between the experts who were reliable and those who were not; as commissioners, hearing them once, could not possibly do. The friends of the amendment also saw that a judge, instead of fixing values for single lots in separately conducted cases, could with much greater speed and accuracy unite and try at the same time the cases for the determination of the values for an entire half mile or more of street frontage. It was also their desire that the same judge should be assigned to condemnation cases where the experts are selected to testify to high values, and to the review of the assessment of taxes on real property where they are hired to swear to low valuations. Many of these reforms, dependent upon the discretion of judges and their willingness to abandon traditional methods, have not yet been accomplished, but enough has been achieved to show that in New York City the amendment is of great merit.

The system discarded by New York City has in other jurisdictions been fairly satisfactory. Evidently in this matter much depends upon local conditions and the general system of which condemnation is a part in that locality, evidently much remains unsettled and in urgent need of further study. It is, therefore, most interesting to note that England has just inaugurated a system totally different from any in use in this country.[16]

[16] In order to understand that system a study of the history of condemnation in England is necessary. The reader is referred to Cripps on *Compensation* and to the recent *Report on Acquisition and Valuation of Land*, mentioned on p. 47. The new system, much less radical than the one recommended in the report, was inaugurated by the Acquisition of Land (Assessment of Compensation) Act, 1919, referred to there.

Change of Attitude Toward Procedure.—Valuable in itself as is the study of procedure in eminent domain under the auspices of the Russell Sage Foundation, it is most significant as an indication of a change of attitude toward such problems. Hitherto we have been chiefly concerned with the objects to be attained in our legislation and have not sufficiently realized the importance, in their attainment, of the methods to be employed for the purpose. It is not until comparatively recent times that we have begun to give serious thought and study to procedure. The first result of increased attention to methods has been an increase in the complexity of our laws. This has been especially so in eminent domain, where, more perhaps than in most subjects, technicalities and delays involve expense which must be paid for by the public as a part of the price of the land it acquires. The study of procedure, for which we are so much indebted to the Russell Sage Foundation, indicates that we are beginning to realize that complicated and cumbrous machinery in eminent domain is an evil which must and can be remedied. Few reforms would more aid the cause of city planning and efficient city government generally than a reform in the procedure in eminent domain, in which studies such as this one are a necessary first step.

Condemnation for General Public Use.—Several recent American writers on municipal government have advocated for our cities the policy of acquiring a large amount of land within the city limits and in its environs, and cite German practice in support of it. A few German cities own very large amounts of land. In so far as this land is acquired in excess of the city's own needs, the purpose of the acquisition is as a rule to control the price of building land, and thus enable the citizen to buy land or rent a house at a low cost. This policy has by no means been uniformly successful in Germany and, just before the War, was still regarded in some quarters as a doubtful experiment. It is only in certain directions and certain parts of the vast periphery of our cities that development will be rapid and the increase in land prices great. In Germany the growth of the city in the direction of the publicly owned land can be made certain by forbidding improvements in other direc-

tions;[17] yet land ownership by the city has by no means always been profitable. As a general policy the extensive purchase of land by German cities is too recent as yet to be judged by its results. Certainly at the prices at which suburban land is held in this country, such a policy cannot be conservatively advocated, even if legal; and many city planners in England believe the same to be true there.

Cities in Germany that do not buy land to control or influence the realty market, do nevertheless purchase land for many purposes, such as the erection of workmen's houses, not here regarded, until very recently in any event, as public. This, however, is by no means the only reason why such cities own more land than cities in this country. In Germany the city acquires land for its ordinary needs in advance. In this way land may be selected best suited for the various public uses. Under such a system, too, planning may be made better to suit land used for public purposes.

This policy of acquiring land in good season we are, in a measure at least, prevented from adopting by the way in which we, in practice, interpret the requirement that property shall be taken only for a public use. This we regard as meaning that each separate piece of property must be taken for a specific public use named at the time of the taking;[18] whereas in Germany this is not considered necessary. It is undoubtedly easier for us by our method to prove the city's case; but, it is submitted, there is no legal reason why, under a statute drawn for the purpose, we in this country should not take land for any legitimate public use to be determined later,[19] and no insuperable difficulty in proving such a case for the city, especially since we are beginning to recognize that there is a certain proportion

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[17] See pp. 39, 457.

[18] This is in part due to the desire of the courts that the relevant facts should appear clearly and specifically in the pleadings. See in this connection Nichols, *Eminent Domain* (2d ed.), ch. XXIII; Noell v. Tennessee, etc., Co., 130 Tenn. 245 at 250 (1914).

[19] The policy of taking land for general public use was advocated by the recent "Land Enquiry Committee" in England; see their report *The Land*, Vol. II, p. 289 and ff. (Hodder and Stoughton, London, 1914). Apparently such a taking is legal in Saskatchewan, Canada; see its Stats. 1915, Ch. 16, sec. 204, par. 80.

desirable between population and public land. It is a significant fact in this connection that, although under present practice in this country property is always condemned for a specific public use, it may nevertheless be diverted to other uses.[20]

[20] Sometimes a state statute forbids a city which has obtained the fee or absolute and complete title to land for a certain purpose, as for instance for park use, to employ this land for any other purpose; sometimes the purpose for which the city acquires the property is specified in the statute under which it is acquired. In this case a statute authorizing a change of use is necessary; but such a statute is unquestionably valid. Brooklyn Park Commissioners v. Armstrong, 45 N. Y., 234 (1871); Brooklyn v. Copeland, 106 N. Y. 496 (1887); Curran v. Louisville, 83 Kentucky, 628 (1886). If, however, only an easement for a given use has been obtained, there can be no change of use except by means of the condemnation or purchase of additional rights in the land. *Ibid.* Where, however, the city has acquired absolute ownership, without any such limitations, and takes land for a given purpose, it may divert it to other uses. See, generally, McQuillin, *Munic. Corps,* Vol. III, secs. 1140, 1141, 1155.

Where land is acquired for a given purpose, and paid for in whole or in part by the assessment of benefits on neighboring property, it is the better opinion that the city may, nevertheless, divert this land to other uses. The levy and payment of the assessment does not constitute a contract; and cities, as they change and grow, must be allowed to change the use of their real estate accordingly. Nichols, *Eminent Domain* (2d ed.) sec. 116, citing cases pro and contra; see Seattle etc. Co. v. Seattle, 37 Wash. 274, (1905), also contra.

In Germany the power of cities to expropriate realty is more limited than with us, but their power to acquire it with the consent of the private owner is greater. Cities in Austria cannot expropriate for any purpose; but must even obtain the land for the construction of streets by agreement with the land owners; the method employed being to establish a plan and refuse permission to the land owners to build on their land until that portion of it needed for the streets is ceded to the city. In Bavaria until recently the law was the same; but on May 9, 1918, a statute was passed authorizing communes of more than five thousand inhabitants to condemn land for highways and for the construction of houses for people of small means.

German cities, as a rule, obtain land for streets by condemnation; but acquire only at private sale land for parks and sites for public buildings, which our cities may condemn; and land for housing and for the purpose of keeping the market price of building land within reasonable limits, for which purposes our cities cannot get it by any method. Prussia, however, in her housing statute of 1918 (see p. 466 of this work) now allows cities to condemn land for small parks and playgrounds, and, until December 31, 1926, for housing people of limited means and sanitation of unsanitary blocks or districts.

There is a growing belief that the housing of people of limited means in this country may be held by our courts to be a public purpose for which land may be condemned; and Massachusetts has passed a constitutional amendment (art. 43) to authorize it.

Land may in some cases be acquired with the consent of the owner when it cannot be acquired for the same purpose against his will; see p. 134.

Condemnation of Land Already Devoted to Public Use.—Land condemned for one public purpose may subsequently be taken for another such purpose, which the legislature has come to consider more important.[21]

[21] Nichols, *Eminent Domain* (2d ed., Matthew Bender and Co., Albany, N. Y., 1917), secs. 351, 352, 361, ff.

CHAPTER II

EXCESS AND ZONE CONDEMNATION AND REPLOTTING IN EUROPE

Excess condemnation, zone condemnation and replotting are related extensions of the power of eminent domain and of the police power. Only one of these extensions, excess condemnation, has been employed in this country; but the others have proved so useful in Europe that it is well worth our while to examine them in the light of their history and consider to what extent they would be serviceable and legal here.

Excess Condemnation.—Excess condemnation is the somewhat unfortunate name in the United States for a development of the power of eminent domain exercised under various names in most European countries. There, as here, private land can be condemned only for a public use. It follows that land only in an amount sufficient for that use can be so taken. The advocates of excess condemnation, so called, claim that there are many cases in which land just outside the physical limits of the principal enterprise should be appropriated for purposes incidental to, and thus a part of it. To call this "excess" condemnation, is to admit that the claim is unfounded and the taking illegal. A better name would be "incidental" condemnation; but it is probably too late to make the change.

An illustration of excess condemnation is the laying out of a new street and the possible taking of land on each side of it, outside the proposed street lines. For what reasons would the city planner wish this extra land; would a taking of it be so related to the construction of the street as to be for street use? If so, this land may be obtained by eminent domain.

Excess condemnation is most often urged either for the cutting of a new business street, or the widening of an old one

through a low class development in the center of the city; or for the laying out of a boulevard in the outskirts through unimproved land. In either case one or more of three effects may be expected:—

First, the adjacent land may be raised in value. In this event the building of the street and the taking of the extra land to sell again in order to help pay for the street may well be regarded as included in the one business enterprise. The increased value is produced not by the local land owner but by the city. If the city does not obtain the profits resulting from this and similar enterprises which it undertakes, the net cost of these enterprises will be increased. No private business could long neglect such incidental gains and escape bankruptcy. Cities which adopt such a policy must either lack needed facilities or be burdened with ever increasing debts.

Secondly, the cutting of the new street may leave remnants of lots on each side of it not large enough for independent improvement, which shut off the land immediately back of it from the street and preclude the possibility of its development. If proper building on the street is delayed until private initiative unites the remnant and the land back of it in common ownership, the delay will be a long one. The result will be that the city will lose much in taxes, and the new street, by reason of its ugly appearance for so many years, will be given perhaps a character that will permanently impair its usefulness and lower values on it.

A third effect may be that the use of the adjacent land, even if not cut into remnants, may lessen the usefulness of the principal improvement. A boulevard with cheap houses bordering it is no longer the beautiful boulevard that the city spent its money to create; a view which the boulevard was planned to exhibit to those using it may be spoiled by a solid row of tall buildings or by buildings at wrong points. If the adjacent land is taken wherever necessary and resold with covenants against such uses of it, the boulevard is improved for the purposes for which it was built.

Street construction is not the only connection in which ex-

cess condemnation may be employed. On the contrary, it is expedient in carrying out most public improvements. A new municipal building of any pretension raises neighboring land values, and if the city does not appropriate the resulting profit, an asset of value is neglected. An inappropriate use of adjacent land mars the effect of the building on which public money was spent. This is bad business as well as bad taste. For the same reasons condemnation of land adjacent to a new park or similar public undertaking may be in the public interest. For much the same reason, land bordering on a public or quasi public industrial enterprise should generally be publicly controlled.[1] Thus the location of appropriate industries on land bordering on a municipally owned railroad would raise the value of that land; and the related development of road and industries would increase the efficiency and profits of both, or, with governmental control, would lower transportation rates and the prices of goods to the consumer. If the road were built and run by private capital, the city or state could obtain its profits by the sale or taxation of the franchise given for such a quasi public enterprise, or enforce lower rates and prices by control in the public interest. In the same way most if not all industrial improvements, public in their nature, could be made to serve the public more efficiently or yield additional public revenue. In fact, it is difficult to conceive of a wisely planned and executed public or quasi public work in which the improvement and the land near it, whether that land is ultimately in public or private ownership, should not be used in harmony and, therefore, developed under common control with that end in view.

Zone Condemnation.—Zone condemnation is the condemnation of an entire zone or district. It is usually employed in the built up parts of cities where the tract in question consists partly of private land, partly of public areas, and is especially useful in the elimination of slums. In such cases it is

[1] In Prussia (*Gesetz Sammlung*, or Collection of Laws, for 1905, p. 179, No. 13, Sec. 16) under the "Law with regard to Construction of Canals, of April 1, 1905," the State is given the right to condemn land on each side of certain state canals within a zone on each side not to exceed one kilometer in width.

not one street with the land abutting on it as in excess condemnation, but a network of streets with the included land that is taken.

In zone condemnation the land in the district selected is taken with all its improvements, public and private, the private owners are paid the value of their property at the time of its condemnation, the improvements, so far as necessary, destroyed, all the land thrown into a common mass, the land for public uses withdrawn, the tract replanned and re-subdivided, and the land destined for private uses resold. The destruction of buildings, streets and similar improvements is expensive but necessary. The bad conditions are usually due not alone to the state of the buildings, but to the fact that buildings as a whole occupy so large a percentage of the area as to leave insufficient space for light and air; that block and lot divisions are faulty; and that streets and other public open spaces are badly planned and located, or insufficient for local needs. Complete replanning in such cases is essential.

Replanning of this sort must be done under the power of eminent domain because the only practical way of financing it is by condemnation and resale. The heavy cost of such a proceeding cannot be imposed upon the private owners. Often the increment is slow in accruing and, when it comes, is too small to pay all the costs; sometimes the land is better suited to new uses with lots of different sizes and shapes, and cannot profitably be so subdivided as to be returned to the former owners. It is only the state that can recoup, and it is only by recoupment that the state can recover what can be thus saved.

Replotting.—Replotting is the re-subdivision of building land. The size and shape of building lots and their relation to each other and to neighboring streets and other public features, greatly affect the character of buildings erected on these lots. It is for the public interest that the plotting should be such as to encourage the construction of healthful dwellings and convenient stores and factories. Proper subdivision is also essential to economical real estate development; and such development, tending to make building lots cheap and abundant, is a

public advantage. It is, therefore, proper that it should be done under public supervision.

In publicly guided replotting, the land is thrown into a common mass, replanned and re-subdivided, as in zone condemnation; but the authorities, instead of paying for and reselling the land destined for private uses, return it to the original owners in the proportions, so far as possible, in which it was contributed. The expenses of the improvement are charged to the land.

Replotting, like zone condemnation, is re-subdivision; but while zone condemnation is a use of the power of eminent domain under which the land must be taken and paid for, thus tying up public funds for a considerable period and involving the public in complicated real estate transactions, compulsory replotting is accomplished by means of the police power, without either of these disadvantages. This difference of procedure is rendered possible by the difference in the task to be accomplished. Where land is highly improved, the costs and losses of re-subdivision, involving the destruction of expensive improvements, met slowly and perhaps only partially by the accrual of increment in value from replanning, would be an intolerable burden upon the private owners; whereas if the land in question is only slightly improved, the cost is small and the increment immediate. It is the absence of costly structures to be demolished which makes re-subdivision by replotting, under the police power, appropriate and fair.

The object sought to be attained by the use of the power of eminent domain in excess and zone condemnation and of the police power in compulsory replotting, is the proper development of the territory involved. To the city planner this result, whether achieved with or without the consent of the owners of the land in question, is equally acceptable. The practical planner recognizes the fact, however, that without compulsion this can seldom be accomplished with the same promptness, fullness and economy, since almost invariably a few of these owners do not realize that the enterprise is in the interest of all, or they see in it opportunity to seize an unfair advantage; and a resort to compulsion is, therefore, necessary to avoid

undesirable compromises, intolerable delays or even entire failure.

In law the differences between compulsory and voluntary action may be said to be in the point of view. To the city the question is whether the property will serve a public use, and it is immaterial whether it is obtained by compulsion or by consent. Accordingly, in England no "excess" or "zone" land can be taken by a municipality by agreement except under circumstances justifying its condemnation. To the property owner, however, in all cases, a voluntary transfer is unobjectionable; and in this country it is settled on authority that excess acquisition with the owner's consent is legal even where excess condemnation is not. There are many statutes authorizing cities to purchase excess land; and it should be noted that they are not statutes of excess condemnation.[2]

Under many statutes, both here and abroad, the public authorities, if they condemn a part of the lot of a given owner, are authorized and often compelled also to purchase the rest of it, if the owner desires to sell. This is a species of excess acquisition just considered, and not excess condemnation; and it should also be noted that it is more in the nature of a rule of damages in favor of the land owner than a city planning power conferred on the public.

It has been stated that compulsory replotting is a regulation of land under the police power, and excess and zone condemnation are a taking of land under the power of eminent domain. What then, precisely, is the difference between excess condemnation on the one hand and zone condemnation on the other, and wherein do they both differ from condemnation usually so called?

Excess condemnation and zone condemnation are both extensions of condemnation into fields in which it had not previously been employed. In excess condemnation, as already noted, the taking is conceived of as incident to another and main taking, while in zone condemnation the taking is conceived of as independent. This, however, does not constitute a funda-

[2] For a reference to the decisions and statutes, see p. 134.

mental difference between them; for both are cases of taking for a public use. Indeed, but for a mischance of legal development due to lack of vision, condemnation would logically have covered both these extensions, and excess and zone condemnation as such would never have been known. Both are clumsy methods of broadening the law to meet city planning needs and conceptions.

Origin of Excess Condemnation, French.—Excess condemnation and zone condemnation, related in their growth, have had a long history. To their development from condemnation proper many countries have contributed. Condemnation may be defined as the regulated taking of property for public use. From time immemorial governments have seized private property, and more and more, as governments grew to be just and free, compensation followed. The regulation of such taking, however, came only with the modern conception of government as the rule of law. In France it first appeared during the revolution; and excess and, later, zone condemnation followed.

Long before excess and zone condemnation, or even condemnation itself properly so-called, manifested itself, France was obtaining many of the results of excess and zone condemnation by somewhat different methods. For centuries France has endeavored to make its capital beautiful, and in so doing has seen the need of harmony in the development of public and neighboring private property. A method of obtaining this harmony, early adopted in Paris, was to sell this neighboring land subject to a covenant entered into by the purchaser, to erect buildings on it, within a given number of years, in accordance with plans furnished by the State. In this way Henry IV as early as 1605 created what is now known as the Place des Vosges.[3] Many of the beautiful squares and streets of Paris and other cities in France and other European countries were planned and constructed under similar contracts.

[3] The contract is given on p. 1 of *Recueil d'Actes Administratifs et de Conventions Relatifs aux Servitudes Spéciales d'Architecture, Ville de Paris,* 1905.

In 1789 France in her "Declaration of the Rights of Man" laid the foundation for a modern condemnation law by providing that:

"Art. 17. Property is an inviolable and sacred right; no one can be deprived of it unless a public necessity, legally established, requires it, and upon just previous compensation."

This provision was confirmed by the constitution of 1791,[4] and subsequently embodied in the civil code [5] with the modification that public utility and not public necessity was required. For a time taking for public use continued to be arbitrary for lack of statutory regulation, but on March 8, 1810,[6] a statute was passed setting up the necessary procedure. This statute was almost entirely superseded by the Statute of July 7, 1833,[7] which, in turn, was practically replaced by the Statute of May 3, 1841.[8] The law of 1841 containing the substance of much of the earlier statutes, with modifications and additions made from time to time by later laws and decrees, is still in force, and is the general condemnation or expropriation law of France. Land, however, is acquired (and paid for) as an incident to the fixing of street and building lines for the rectification and widening of highways, under the law of September 16, 1807, and similar statutes subsequently passed.[9]

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[4] Preamble, Art. 3, 4.
[5] Art. 545.
[6] *Bulletin des lois,* IV[e] sér., Bull. 273, No. 5255.
[7] *Bulletin des lois,* IX[e] sér., Bull 107, No. 241.
[8] *Bulletin des lois,* IX[e] sér., Bull. 808, No. 9285.
[9] The law of September 16, 1807 (*Bulletin des lois,* IV[e] sér., Bull. 162, No. 2797) is known as the "Law for the Drainage of Swamps, Construction of Streets, etc." When existing streets are widened under this law, the land needed for the purpose must be paid for when acquired (see sec. 50); but between the time of laying out the wider street and the taking of the land for the widening, the owner of this strip is deprived of rights in it for which, everywhere in this country except in Pennsylvania (see p. 30), the authorities must pay. If there are buildings on it, the owner may use them, but can make no substantial repairs or renewals on them or replace them. If, therefore, the city, having laid out its wider street, is willing to wait until buildings on it are worthless, it may do so with safety, and can then take the strip of land needed for the purpose on payment of its value without buildings. The law is much the same in Germany.

In France, prior to the planning statute of 1919 (see p. 529), the city acquired no rights whatever in land by the laying out of new streets. To establish a plan of such streets, or fix any lines of such streets, so that

It was the statute of 1807, just mentioned, which introduced the principle of excess condemnation in France. That statute (sec. 53) gives the land owner the right, on payment, to take remnants left by the relocation of street lines which cut him off from the new street, and empowers the public authorities to expropriate his entire lot if he does not do so. The conditional right given by this statute to the authorities to take land outside the lines of the street, is a limited right of excess condemnation; and excess condemnation, thus made a part of the law of France, has remained so ever since; but for many years there was no extension of the principle.

The law of 1807 (sec. 51) and subsequent laws, provide that the owner of a lot, a part of which is appropriated for public use, may require the authorities in certain cases to take and pay for his entire lot. Provisions more or less similar to this are in the laws, of later date, to be found in many other countries.[10]

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property owners must observe them, the city may now resort to the planning statute; and must, now as before, take the land by resort to the condemnation law. In Germany, it will be remembered, the planning law is also, in most of the states, authority for condemnation of land or any interest in it which is needed under the plan. (See p. 452.)

In this country, except in Pennsylvania, street widenings if not done at once when planned, can be insured only by establishing a building line under eminent domain; with relation to which see p. 177; or perhaps by creating a building line under a zoning plan; with relation to which see p. 279.

The French law of 1807 also provides for the collection of local benefits due to public works, or their deduction from the compensation to be paid for land taken for such works; but the procedure for their collection proved to be so cumbrous that it is only within very recent times that any attempt has been made in France to obtain them.

[10] French expropriation laws of July 7, 1833, and May 3, 1841. A translation of the law of 1841, as subsequently amended, will be found on p. 91 of this work. The provision referred to is art. 50. Similar provisions will be found in general expropriation laws of Prussia (June 11, 1874, in *Gesetz Sammlung* or collection of laws for that year, p. 221, sec. 9); Württemberg (Dec. 20, 1888), art. 11 as amended by the Ausführungsgesetz zum bürgerlichen Gesetzbuch of July 28, 1899, art. 209; Belgium (in which the French expropriation law of March 8, 1810, with minor amendments is still in force); England (Land Clauses Consolidation Act, 8-9 Vict. ch. 18, 1845, sec. 92, and subsequent acts. See Cripps *Law of Compensation* (4th ed., 1900, Stevens & Sons, London), p. 32; Canada, Revised Statutes, 1906, vol. 3, ch. 143; Prussian "City Planning" Law of July 2, 1875, sec. 13; Italy (Law of Expropriation for Purposes of Public Utility, of June 25, 1865, sec. 23, Raccolta Ufficiale, v. 12, 1865, No. 2359); United States, Dunn v. City Council of

General Expropriation Law of France.—To an understanding of excess and zone condemnation in France, some knowledge of procedure in condemnation in that country and the differences between it and such procedure in this country, may prove helpful. Inn the United States, at common law, the condemnation statute is a complete grant of the power to take land for public use. In France and other Latin countries, under the civil law, the power given by the statute is inchoate, and cannot be exercised until the state, in each case, completes it by a declaration that the particular undertaking, falling within the general provisions of the law, is such as will prove useful to the public; and officials of the state indicate the particular pieces of land which may be acquired for the purpose. Subsequently, in France as in this country, the courts pass title to the land and fix the indemnities, unless the parties can do so by agreement.

The requisites to condemnation for public use in France are therefore:

1. A law granting that right generally.

2. A law, administrative decree or ordinance declaring that the specific improvement for which the land is desired is in the public interest, and directing that this improvement be carried out.

3. A designation by the prefect of the locality where the land is situated, stating the location of that improvement, unless the law or ordinance of public utility, already passed, sufficiently indicates, in a general way, its future location. Where an extensive enterprise, like a railroad, or a national highway, is contemplated, a further designation is usually necessary.

4. A subsequent decree of the prefect describing by metes and bounds the specific land required for the work. This designation cannot be made until the proprietors of the lands in

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Charleston, 16 South Carolina Law Rep.—sometimes cited as Harper's Law Rep. (S. C.)—189 (1824): Boulat v. Municipality No. 1, 5 Louisiana Annual Reports 363 (1850); Mayor, etc. of Baltimore v. Clunet, etc., 23 Md. 449 (1865); Massachusetts Acts, 1904, Ch. 443; Revised Statutes Manitoba, 1913, vol. 2, ch. 69, p. 1035, sec. 7; *ibid.* Munic. Inst., ch. 133, sec. 691; Revised Statutes Ont. 1914, Munic. Inst., ch. 192, sec. 322, sub-sec. 2.

question have received notice and been given an opportunity to be heard.

5. A judgment of a court, with a jury, passing title to the lands and fixing the indemnities.

This process has been summarily characterized in a standard French treatise as follows:[11]

"The procedure in expropriation may thus be divided into two periods: in the first, the government orders the work to be constructed, and determines its location; in the second, the courts give the state title to the lands necessary for its execution. The first period—the one which may be called the administrative—must itself be divided into two successive phases, which result, the one in the declaration of the public utility of the enterprise, the other in the designation of the lands to be expropriated. Each of these acts must be preceded by an inquest.[12]

"Each of these two inquests has its distinct object. Before the declaration of public utility is made, the expediency of the work in relation to the general interests of the community must be determined; and it is with relation to this point that individuals are notified to give their opinions, as citizens, and not as land owners. But once this decision has been reached, it remains only to discover the means of execution most suited to the reconciliation of the interest of private property with those of society; and this is the object of the second inquest."

Of great importance is article 52 of the law of 1841, the substance of which first appeared in the law of July 7, 1833. This article provides that:

"Improvements give rise to no claim for reimbursement if, by reason of the time at which they were made, or of any other circumstance brought to the attention of the jury, it believes that such improvements were made in order to obtain increased indemnity."

This article makes the plan of an improvement for which expropriation is sought, binding on property affected by it; for if the land owner, with knowledge of the plan, disregards it, he does so at his peril. A similar clause is now found quite generally in European and American expropriation laws, the American provision being narrower than those to be found in

[11] *Pandectes Françaises* (Paris, 1899), Vol. 31, p. 21.
[12] Public hearing.

European statutes. It is the inclusion of more or less similar provisions in European city planning laws—which may be characterized as condemnation laws in which the plan of condemnation is to be executed at intervals over a considerable period of years—that make city planning laws in Europe effective, as, in the absence of such provisions, our statutes cannot be.[13]

Beginning of Excess Condemnation in the United States.—It was in the United States that the practical use, to any considerable extent, of excess condemnation first occurred. In 1812 the State of New York passed a statute [14] allowing New York City to condemn remnants left in cases of street and park openings. The land thus acquired was in practice sold promptly. The owner of adjoining land was given the first opportunity to purchase. Excess condemnation was regarded not as a revenue measure but as a method of securing a desirable development of abutting land. In 1834 the New York courts declared this statute unconstitutional [15] and the practice stopped. Extensive use of this procedure was made in New York City, but it did not spread to other states. It was not revived in the United States until 1904, when the renascence of city planning in this country had already occurred; and this revival was probably due to the influence of foreign experience.

Excess Condemnation in England.—The first European country to make any considerable use of excess condemnation was England, where the practice began about 1845. England, like other countries, possesses and uses the power of eminent domain. As in other civilized countries, private property can be taken only for a public purpose on payment of just compensation,[16] but, unlike most such countries, she has nowhere for-

[13] See pp. 28, 453, ff.

[14] Laws N. Y. 1812, ch. 174.

[15] Matter of Albany St., 11 Wendell (N. Y.) 149.

[16] As to whether in some cases, as for instance that of the Irish land legislation, the compensation to the land owner was just, in the legal sense of the word, see Lecky, *Democracy and Liberty* (Longmans, Green and Company, 1899), Vol. 1, pp. 67, 182, 209 and ff.; Montgomery, *Land Tenure in Ireland,* and similar books.

mally guaranteed the property owner this protection. His actual immunity from the unjust seizure of his property is due to the fact that under the law no one can interfere with any property right without authority from Parliament, and in practice Parliament gives permission for such interference only for a public purpose, on condition that due compensation is paid.

Until comparatively recent times all power to condemn private property for any particular purpose in England was granted by a special or private act of Parliament, stating specifically what property could be taken for that purpose. Gradually various classes of general laws were passed giving this authority. At present local governments have the general right to take land for most of their needs.[17] Sometimes they can do this without, more often with, the consent of the local government board, ratified, practically as a matter of course, by Parliament. All these laws limit the taking to the lands necessary for the specific enterprise. Rarely does the law give any general authority of excess condemnation; practically all such authority is by special law. If the power is desired for any particular improvement, the practice is to apply for a special law granting the right not only of ordinary but of excess condemnation, and designating the land that may be taken, both within and without the lines of the main undertaking.[18]

Until 1845 each act granting the power of condemnation for any given enterprise deemed and thus declared to be public, contained clauses stating in detail what property should be taken and what rules for determining the compensation should be followed. The clauses for fixing the compensation, as they multiplied, became precedents, and were called the "common clauses." In 1845 these clauses were codified in an act called the "Land Clauses Consolidation Act," [19] now referred to,

[17] For the construction of new streets and the widening of old ones in the built-up parts of cities, the special authority of Parliament is almost always necessary.

[18] The Development and Road Improvement Funds Act, 1909, (9 Edward 7, ch. 47) gives the board the right, with some limitations, to take land on either side of a proposed road, within 220 yards of its centre; and there are similar laws in Canada; see p. 74.

[19] 8 and 9 Vict., Ch. 18.

with its amendments and supplements, as the "Land Clauses Act." [20] This codification of 1845 was made to avoid the necessity of drawing up special clauses to incorporate in each condemnation law. It is deemed a part of every such law except in so far as that law impliedly or specifically excludes it. In the Act of 1845 were inserted rules with regard to "superfluous lands," or lands not needed for the main improvement. Thus the Act of 1845, although it did not authorize excess condemnation, nevertheless recognized and provided for it; and the granting of this power in England by special and private acts dates from about this time.

Land in the neighborhood of a public improvement is thus condemned in England both to guide its development and to profit by its rise in value. The main purpose of this practice in England, however, is profit, so that a part at least of the cost of the enterprise may be recouped. As a method of guiding neighborhood development excess condemnation seems to have been fairly successful in England; as a means of recoupment its success is harder to determine.[21] In many cases the bookkeeping is misleading. For instance, the initial cost of the land is sometimes in part written off; and in some cases interest is not charged on the cost of land not as yet sold. Nevertheless, there has been a decided saving by the use of this method, in spite of the fact that English law and practice impose upon its exercise many conditions which interfere with its financial success. Some of these onerous conditions are the following:

1. Under the Land Clauses Consolidation Act, superfluous land must be sold within ten years of the time named in the act of condemnation for the completion of the work, unless that act fixes a different time for its sale. This period is often too short to allow the increment to accrue. Moreover, the nearer the expiration of the time limit is, the greater the disadvantage of the city in its negotiations with purchasers.

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[20] See Cripps *Law of Compensation* (4th ed.), p. 1.

[21] For a late opinion on the subject see the English Ministry of Reconstruction: *Report of Committee on Acquisition and Valuation of Land for Public Purposes,* 1918.

Often, too, the time when a sale becomes imperative proves peculiarly unfavorable for disposing of real estate. This clause is frequently modified in later acts.

2. The English cities did not make it a practice to lease superfluous lands pending their sale. In this way carrying charges and interest accumulated without any income to meet them. This is sometimes concealed by the failure, already mentioned, to charge interest; but such bookkeeping methods do not prevent the actual loss they attempt to cover.

3. The Act of 1845 provides that if the scheme involves the demolition in any one parish of twenty houses or more inhabited by persons of the laboring class, there must be provision made, if it is lacking, for their rehousing in the vicinity. This is often expensive, especially when the land condemned is better suited and more valuable for purposes other than housing. This clause also is now frequently modified or excluded.

4. It was, until 1919, the custom to allow the land owner, on condemnation, 10 per cent over and above the market price; but in takings by public bodies is so no longer.[22]

5. In some cases, as, for instance, that of the well-known Kingsway improvement in London, architectural conditions to enhance the dignity of the street have been imposed on purchasers of land. This, if carried far, tends to decrease net returns by deferring sales of land or lowering its price. Much as such restrictions may improve the city's appearance, they may be a source of serious financial loss if they go beyond a moderate minimum.[23]

In Canada, Australia and India, the law of excess and zone condemnation is based upon English precedent.[24]

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[22] Acquisition of Land (Assessment of Compensation) Act, 1919.

[23] In England the hearings and inquiries incident to the passage of a private act or the granting and confirmation of an order for condemnation now required, give to the proceedings much the character of the French expropriation. For a good account of the English procedure see Ministry of Reconstruction; *Report of Committee on Acquisition and Valuation of Land for Public Purposes,* 1918.

[24] Thus in these countries will be found provisions that land desirable for the use, convenience or enjoyment of any public works, may be condemned. (New Zealand, Public Works Act, Consol. Stats. 1908, vol. IV, no. 160, sec. 29; Queensland, Public Works, Land Resumption Act of 1906, Statutes, 1911, vol. III, p. 3608. British Columbia has passed

Changes in Method of Assessing Compensation.—Recent changes in methods and principles of assessing compensation for land compulsorily taken in England, although much less thoroughgoing than advocated by a recent Royal Commission which investigated the subject,[25] are certain to be of great importance in this connection. These changes are embodied in an act applicable to all land condemned by public authorities [26] and in an amendment to the Housing, Town Planning, etc., Act, 1909.[27] The provision in the Town Planning amendment for the compensation of owners of slum areas taken, although it is similar to recent Dutch [28] and French [29] legislation in this respect, is to us startling in its novelty. Under this new English law [30] the amount to be so paid

"for the land,[31] including any buildings thereon, shall be the value at the time the valuation is made of the land as a site cleared of buildings [32] and available for development in accordance with the requirements of the building byelaws for the time being in force in the district: [33]

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a "Land Clauses Consolidation Act," based on the English statute. See also Revised Statutes Brit. Columb., 1911, vol. 2, ch. 128, p. 1469). Saskatchewan allows "adjoining" land to be taken (The Town Act, Stats. 1916, ch. 19, sec. 208). See also Ontario, Revised Statutes, 1914 (Munic. Corps.) ch. 192, sec. 322, (2) amended, 1921, ch. 63. Very generally it is expressly provided that land not needed may be sold, or leased. In New Zealand (Public Works Act, Consol. Stats. vol. IV, p. 879, sec. 85) and Saskatchewan, the court may award easements and surplus land in lieu of cash. See also Halifax City Charter, 1914, sec. 683, 698; Montreal Charter, Art. 421 as amended by Stats. P. Q. 1912 (3 Geo. V), ch. 54, sec. 20; Toronto Charter as amended by Stats. Ont. 1911, ch. 119, No. 12; see also Revised Statutes, ch. 192, sec. 322.

[25] The Ministry of Reconstruction Report on *Acquisition and Valuation of Land for Public Purposes*, 1918, already referred to.

[26] The "Acquisition of Land (Assessment of Compensation) Act," 1919, already referred to.

[27] Housing, Town Planning, etc. Act, 1919; see p. 499 of this work.

[28] Holland, Housing Law of June 22, 1901; see p. 495 of this work.

[29] Law of June 17, 1915, see p. 76 of this work.

[30] Sec. 9 and first schedule.

[31] I. e., the slum land; where adjacent land, in a sanitary condition, is included to secure the efficiency of the scheme as a whole (as it may be, —see this section in full, p. 518 of this work) it, and the buildings on it, are paid for in full.

[32] I. e., no payment is made for the insanitary buildings, to be destroyed.

[33] I. e., for buildings to be constructed in accordance with the present structural regulations, and with the open spaces now required for the access of light and air.

"Provided that, if in the opinion of the Local Government Board it is necessary that provision should be made by the scheme for the re-housing of persons of the working classes on the land or part thereof when cleared,[34] or that the land or a part thereof when cleared should be laid out as an open space, the compensation . . . shall be reduced"

by an amount equal to the necessary expenses of such rehousing and of laying out such open spaces.[35]

It seems clear that this provision of the English statute is just to the land owner, and that the former statutes in England or elsewhere giving him a greater compensation are unjust to future tenants of such land and to the public. The land with the buildings on it are taken by the state because the buildings are unsanitary in themselves and occupy an undue proportion of the lot, thus leaving an amount of open space for the access of light and air insufficient for health; the state is therefore in duty bound to prevent the further use of the property in its present condition; as a prerequisite to such use it may therefore with justice to the owner, and must in justice to the community, require him to put the premises into sanitary condition, and in taking the property to make it sanitary, has the legal and moral right, as a method of making the owner pay for so doing, to deduct the cost from the compensation paid him for his realty.[36]

Excess and Zone Condemnation in France Since 1850.—The movement in France which resulted in an enlargement of the limited right of expropriating remnants first to be found in the law of 1807, already mentioned, and also in zone condem-

[34] The "principal act" (Housing of Working Classes Act, 1890) requires such rehousing in certain cases, it being considered wrong to tear down the slum-dweller's home without providing him with another.

[35] With regard to this section see, generally, p. 386 of *Law and Practice of Housing* (Hodder and Stoughton, London, 1921) by Sir Kingsley Wood.

[36] In this connection the following provision of the Acquisition of Land (Assessment of Compensation) Act, 1919 (9 and 10 Geo. 5, ch. 57) is of importance:

2. (4) "Where the value of the land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the inmates of the premises or to the public health, the amount of that increase shall not be taken into account:" [in fixing the compensation to be paid the owner, etc.]

nation, originated in the desire of Napoleon III to improve Paris; as a result of which he caused two statutes to be passed in aid, one of the sanitation, the other of the beautification, of the city.

The statute of Napoleon III, for the sanitation of Paris and other cities in France, was passed April 13, 1850.[37] It provides that where the unhealthfulness of a dwelling for hire situated on a given lot is the result of permanent causes outside the building, or where the causes cannot be removed except by an improvement embracing both dwelling and outside conditions, the commune may, under the general condemnation law of the state,[38] expropriate the entire lot, selling remnants at public auction.[39] This statute, which did not materially enlarge the right of condemning remnants, relates only to lots abutting on a public highway with dwellings for hire on them, and proved to be of little use. It was, therefore, repealed and replaced by the statute of February 15, 1902.[40] This law (sec. 18) reënacts, practically word for word, the law of 1850, except that it is made to apply to realty for hire or occupied by the proprietor, built up or not, whether abutting on the highway or otherwise. The statute of 1902 proved to be no more useful than its predecessor and has been invoked only in two cases of comparatively small importance, for the reason that the provisions of the general condemnation law and the traditions governing the conduct of juries under it involve too heavy an expense. The law of June 17, 1915 [41] was accordingly passed, which enlarges the scope, simplifies the procedure and lessens the cost of expropriation for sanitation. This statute is the first zone condemnation law of real importance in France.[42] The law gives communes the right to condemn entire insani-

[37] *Bulletin des lois,* X^e^ série, Bull. 252, No. 2068.

[38] The law of May 3, 1841; see p. 91, ff.

[39] As a rule, in such cases, the former owners are given, under Art. 60-61 of the Act of 1841, the preferential right to acquire such remnants. The sale in the present case, however, is free from this preferential right.

[40] *Bulletin des lois,* XII^e^ sér., Bull. 2348, No. 41496.

[41] *Bulletin des lois,* nouv. sér. Bull. 156, No. 8736.

[42] The statute is not called a statute of zone condemnation in France; the first law there to be so considered being that of November 16, 1918, mentioned below.

tary tracts or districts, in which lots in themselves sanitary may be included if necessary for the success of the undertaking as a whole. The price of the insanitary lots is fixed at their market value less the cost of making them sanitary; or, if this cannot be done, at the value of the land cleared of buildings, plus the value of the materials in the buildings. The future use of lots not put to public use, and the conditions subject to which they shall be sold, are also fixed. In no case shall the value placed upon a piece of realty expropriated be less than that of the land without buildings; in no case shall compensation be increased because dispossession is involuntary. If any tenant deprived of his property is carrying on an offensive industry under special license, and that industry is a cause of the existing bad sanitation, his damages shall be reduced by a sum equal to the profits obtained at the expense of the public health. The indemnity of the other tenants for eviction shall be a sum equal to three months' rent, but in no case less than f30 or more than f100. For expropriation under this statute a simplified procedure of its own is provided.

The decree-law [43] of March 26, 1852 [44] was promulgated by Napoleon III, as an independent provision, to escape from the narrow limits of the general power of excess condemnation under the law of 1841,[45] which the Emperor found such a hindrance in his plans for the beautification of Paris. The law, which applies not only to Paris but to such other French cities as have asked that it be extended to them, provides (art. 2) that in the enlargement, rectification or laying out of streets, the city shall have the right to take the whole of a lot, any part of which is within the new street lines, if the remnant is not of a size or form to permit of the erection on it of healthful structures, and also if necessary for the suppression of old highways. These remnants falling outside the new lines may be reunited with the neighboring properties by private contract or under the provisions of the law of 1807 already referred to. Originally under this statute the city was the

[43] *Décret.*
[44] *Bulletin des lois,* X^e^ sér, Bull. 514, No. 3914.
[45] *Bulletin des lois,* IX^e^ sér, Bull. 808, No. 9285.

judge of the expediency and propriety of appropriating remnants; but a decree of December 27, 1858,[46] provided that in case the person expropriated objected, a decree of public utility from the state authorities was needed as in other cases of expropriation; and on June 14, 1876[47] a second decree made the same requirement even if there was no such objection.

As originally interpreted by the city authorities in their own favor, the law of 1852 gave them a fairly ample authority; and under it large tracts of land were taken on the ground that they were remnants upon which healthful structures could not be built. In this way, also, the policy of taking land for resale at a profit was followed with some success. It was during this period that practically all the applications by cities other than Paris for the extension of the law to them were made. The decisions of the state authorities under the decrees of 1858 and 1876, however, greatly restricted these powers. The maximum size of the remnants that could be condemned as compared to those that were formerly taken became very small; and resale at a profit, never a legal ground for expropriation, became practically impossible. In consequence, a demand for a further revision of the statute of 1852 arose, and the amendment of July 13, 1911[48] and law of April 10, 1912,[49] were passed. Under them, cities may condemn remnants not only when they are not of a size or form permitting the erection of a sanitary building, but when the building would not be in keeping with the importance of the highway or with its æsthetics; a remnant may, in any case, be taken compulsorily when it is not more than 150 square metres in size and whenever the public works occupy more than half the lot; and with the consent of the owner remnants of any size may be acquired.

The statutes of 1911 and 1912, except for the greater latitude granted when the owner consented to the excess taking, were merely a meagre enlargement of the previous right—all that France in law had ever possessed—to condemn remnants on the ground that they were not suitable sites for buildings.

[46] *Bulletin des lois,* XI[e] sér, Bull. 656, No. 6111.
[47] *Bulletin des lois,* XII[e] sér, Bull. 305, No. 5251.
[48] Being Article 118 of the so-called "Loi des Finances" (No. 2933).
[49] *Bulletin des lois,* nouv. sér. Bull. 79, No. 3950.

A recent statute, passed November 6, 1918,[50] transforms a power which was smaller in France than that of most European nations into one greater than that to be found in any other country.[51]

The statute of 1918, unlike the previous statutes, is an amendment of the general condemnation law. It provides (amended art. 2) that not only land within the lines of proposed public works but all land recognized as necessary to assure to these works their full value, immediate or future, may be declared of public utility and expropriated; especially land in a city outside street lines, interfering with a rational subdivision into lots or not susceptible of use as the site of structures in accord with the general plan of the public works contemplated; also (art. 2 *bis*) land which, by reason of its proximity to a proposed public work, should yield an increased value of more than 15 per cent. The owner of land to be taken for its increased value may retain it by paying a sum equal to that increase. A decree of the state authorities declaring its public utility is necessary in all cases of excess taking.[52]

Excess and Zone Condemnation in Belgium.—The law of Belgium on the subject of excess and zone condemnation was for many years distinctly in advance of that of France. The Belgian law of July 1, 1858,[53] allowed excess condemnation for sanitation in connection with street construction. On November 15, 1867, that law was amended so as to permit zone condemnation in aid of practically all plans for city construction and improvement.[54] The amended law provides that:

"Art. 1. When a plan for the improvement, as a whole or in part, of an old section of a city, or the construction of a new section, is

[50] *Bulletin des lois,* nouv. sér, Bull. 237, No. 13222.

[51] Important, but too special to interest us, are the reforms made by this law in the jury system as applied to condemnation proceedings in France.

[52] In France condemnation under the law of 1918 is called zone condemnation because a belt or zone of land may be taken on each side of a proposed improvement; and taking under the law of June 17, 1915, is not so referred to; but to save confusion the definitions already given in this work have been adhered to in all cases.

[53] *Pasinomie des Lois,* 1858, p. 217.

[54] See the reports accompanying the law when proposed in *"Pasinomie des Lois"* for 1867, p. 287.

proposed, the government, on petition of the Communal Council, may authorize the expropriation under the laws of March 8, 1810, and April 17, 1835, of all lands destined for highway or other public uses, including lands for structures which are a part of the general plan. . . ."

There are provisions for the condemnation and sale of remnants. The project is subject to the approval of the king.[55]

Zone Condemnation in Italy.—At about this time,—June 25, 1865—Italy passed its expropriation law,[56] which is also a zone condemnation and city planning act. This statute states perhaps more happily than any other the purpose of zone condemnation, as follows:—

"Art. 22. There may be included in the condemnation not only the land that itself is necessary to the execution of the public work, but also the lands lying within a given zone, whose inclusion directly helps to accomplish the chief object of said work. The right to condemn the contiguous lands must be stated expressly in the decree which establishes the public use or be given by supplemental royal order."

Influence of English Housing Reforms.—In the adoption of her excess and zone condemnation laws Belgium was evidently influenced by the similar but more conservative and restricted legislation of France. England, however, contributed in no small measure to this result. The English zone condemnation law was not passed until later, but her endeavors to secure housing reform had begun long before. Modern industrialism started in England. The conditions of modern industrialism produce the large city, which in its unregulated growth seems inevitably to produce the slums. England, being the first nation brought face to face in its slums with modern housing evils in an acute form, was the first conscientiously to investigate and attempt a solution of the slum problem and of modern housing problems generally. This movement profoundly influenced industrial Belgium, and all Europe.

[55] In Germany minor remnants are eliminated and petty readjustments of boundaries obtained under the police power, the owner being required to consent as a condition to the issuance of a building permit. See p. 488 of this work.

[56] See pp. 465, ff of this work.

The first of the long series of modern English laws for the elimination of insanitary housing [57] were the Lord Shaftesbury acts, two in number, both passed in 1851. The earlier of these laws (14 and 15 Vict. ch. 28) deals with the occupancy of what we in America call lodging houses. The later one (14 and 15 Vict. ch. 34) provides for the building by municipalities of houses for the working classes, and the purchase of land, if necessary, for that purpose. An investigation, begun in 1844, had shown unmistakably the intolerable overcrowding, the great lack of light and air, the wretched construction and repair of whole districts in the large cities. A sufficient supply of new houses, it was thought, would remedy these evils; and the second Lord Shaftesbury act was passed for that purpose.

Whatever benefit the new municipal houses—the few that were built—proved to be to those who succeeded in securing them to inhabit, they did not make unnecessary the use of the old slum houses, nor better their condition. An improvement was attempted in the Torrens Act of 1868 (31 and 32 Vict. ch. 130). That law required the owner to repair, or tear down and rebuild, houses declared by the authorities to be uninhabitable.

But the Torrens act was not a sufficient remedy and still the slum remained. The repairing or tearing down of a house here and there, even the permanent removal of some houses that most obstructed the light and air of the rest, was not enough to do away with the slum evil; for a cause of the persistence of the slum was the condition of the district as a whole with its narrow, crooked streets and small shallow lots. This could be remedied only by tearing down all the houses, throwing lots and streets into a common mass and replanning the district entirely.

The first legislation to deal with slum areas in this way was the well-known Cross act (38 and 39 Vict. ch. 36) passed in 1875. Under it the municipality could take title to any such tract as an unhealthy area, destroy all existing buildings, relocate the streets, lay out proper house lots on them, and provide

[57] Only a few of the principal acts are cited in this brief summary.

for suitable houses there. The act is popularly called the "Unhealthy Areas Act" and is now included in Part I of the "Housing, Town Planning, etc., Act, 1909." [58] It is the first English zone condemnation law. It contains provisions which specifically authorize the condemnation of land, not perhaps itself insanitary, which renders contiguous land unhealthful or prevents its proper sanitation. The English act is not the first to accomplish this result. Such land could undoubtedly be included in the condemned area under the Belgian act of 1867; indeed, that act was passed in part for that very purpose.[59] Nevertheless, the specific provisions of the English law have had their influence.

Another widely copied clause in what is now Part I of the act of 1909, authorizes the destruction of an "obstructive building" which is defined to be a building that

"although not in itself unfit for human habitation, is so situate that by reason of its proximity to or contact with any other buildings it causes one of the following effects, that is to say:—

"(*a*) It stops or impedes ventilation, or otherwise makes or conduces to make such other buildings to be in a condition unfit for human habitation or dangerous or injurious to health; or

"(*b*) It prevents proper measures from being carried into effect for remedying any nuisance injurious to health or other evils complained of in respect of such other building." [60]

The elimination of insanitary areas in English cities is much too large a subject to be treated adequately here. There can be no question of the existence of the evil or of the fact that the remedies used have improved conditions in the section of the city where they were applied; but to what extent were conditions bettered in the city as a whole? A vast amount of money has been spent, and it is generally believed that the result has not been in proportion to the amount expended. To what extent have the methods adopted been responsible for this fact?

In the first place, for many years insanitary housing condi-

[58] The English Unhealthy Areas Act is given in full on p. 88 of this work.

[59] See p. 79.

[60] Such a building may be pulled down under Part II of the act of 1890, as an "unhealthy dwelling house" (53 and 54 Vict. ch. 70).

tions were removed at public cost with no adequate legal methods of preventing a recurrence of the evil. The result was much useless expense; for under these circumstances no permanent cure could be expected. Slum removal without proper regulation of building and of lot subdivision is of little lasting value.

Secondly, slum removal was tried without a proper consideration of the interests and resources of the city as a whole. The slum district chosen should have been studied and put to the use for which it was most valuable and best suited; the location for rehousing should have been selected where land was cheap and healthful and proper transportation to it, if necessary, provided. Thus the city, instead of being burdened with debt, might have been made more prosperous by additional facilities and population where they could be made useful. Instead, the law required the rehousing of the people dispossessed near their old homes, and the former slum area was predestined to be used again for housing. Certainly there is no presumption that a use for which the area has proved a failure is that to which it is best adapted, much less that it is the best area that can be selected for the purpose.

Of course, such districts may always be made suitable for housing, just as they may be converted into botanical gardens or marine parks—by a *tour de force*. Private capital will not undertake such an enterprise; therefore, municipalities in many cases have done so. Is it strange that they have spent a great deal of money, obtained a financial return disproportionate to the outlay, and, relatively to the size of the slum evil in England, done very little good? Slum elimination without city planning is expensive and ineffective.[61]

Replotting in Switzerland and Germany.—The plotting, and consequently the replotting, when necessary, of building land under governmental supervision, is a logical extension of the public regulation of the planning of streets and buildings. To a considerable extent the form and area of a lot determine the form of the building which will be erected on it, and the

[61] Statutes and ordinances of excess and zone condemnation are to be found in Germany; for references see p. 87, Note 74.

amount of light and air that those who live or work in it will receive. To a considerable extent the street system of a city is, or should be, laid out in order to obtain blocks that will subdivide into lots of proper form and area. To some degree building regulation, by requiring vacant spaces on the lot in certain locations and proportions with relation to structures, also determines the size and shape of lots. The actual subdivision of the block into lots under public supervision is the next step, and, like the block division resulting from street planning and the area requirements of building regulation, its object is the improvement of housing and working conditions.

To some extent European law regulates the plotting of building land. Thus in some of the German states lots may be declared unsuited to building [62] and the authorities may require the land owner, as a prerequisite to the issuance of a building permit, to buy or sell small remnants, necessary to round out his or his neighbors' lots.[63]

The next step is the direct control of subdivision, which exists in a few places. Thus in Vienna [64] a plat or plan of lot subdivision must be filed with the authorities and receive their approval before subdivision is allowed; in Zurich, Switzerland,[65] the owners of land between main streets are required to submit a local plan showing minor streets and the plotting of all land in the locality; and if they do not do so, the authorities establish such a plan after the land owners have been given an opportunity to be heard with regard to it; and in Sweden [66] the subdivision of building land into lots is an essential part of the city plan made by the authorities, required in advance of building development.[67]

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[62] Hüffner, *Württemberg Building Ordinance* (Tübingen, 1912), p. 84, note 4, end.

[63] Dresden, Strassenbauordnung, sec. 29; Leipsig, Ortsbauordnung, 1897, sec. 34, Saxony, General Building Law of July 1, 1900, as amended May 20, 1904, sec. 66, a translation of which will be found on p. 474 of this work; Württemberg, Building Ordinance of July 28, 1910, sec. 26.

[64] Building Ordinance of January 17, 1883, sec. 3, (L. G. Bl. No. 35).

[65] Building Law of April 23, 1893.

[66] Planning Law of August 31, 1907.

[67] The schemes under the British planning acts, and the acts modeled on them, in Canada, Australia and India more and more include pro-

If it is for the public interest that building land should be properly subdivided, evidently the public should not only supervise plotting, but require and aid replotting when plotting is found to be faulty. In a few jurisdictions this may be done by eminent domain;[68] but when so accomplished the public authorities must take and pay for the land to be replotted, recovering the money by its resale. This involves a serious disturbance of private rights, and commits the public to a long and expensive real estate transaction. When, however, replotting is done under the police power, the owners retain title to an undivided share of the common mass, and are reimbursed by a new lot equivalent to the lot contributed by them, thus avoiding the disadvantages incident to replotting by eminent domain. The prerequisites to the starting of the proceeding vary, a petition signed by a given percentage of the owners reckoned in proportion, sometimes to their number, sometimes to the area of their land, sometimes to its value, being required. Almost invariably, however, it is essential that the public authorities find the proceeding to be in the public interest; the profitable and economical development of building land, tending to produce cheaper and more abundant building lots, being in all cases regarded as sufficient public advantage.

Replotting is especially useful in the outskirts of cities. This is peculiarly the case in Germany. In many Continental countries, Germany among them, agricultural land came in the course of centuries to be subdivided minutely or into long, very narrow strips. This made cultivation difficult and expensive; and for many years before replotting of building land was resorted to, agricultural land was replotted to overcome these difficulties. Often the object sought was not the mere relocation of boundaries so much as the aggregation of small holdings into lots of reasonable size.[69] German cities in their

visions for a greater or less amount of replotting. For references to these Acts see pp. 498, ff.

[68] Thus in Hesse (arts. 16-18 of the law of July 15, 1895, with regard to the extension of the city of Mayence; and General Building Ordinance of April 30, 1891, Art. 13, 59, 69) the city may forbid all building on land faultily subdivided and has the right to expropriate, replan and sell it.

[69] See, for instance the Saxon laws of June 14, 1834 and July 23, 1861. Similar laws were enacted in Prussia and other German states. This

growth have now encroached upon surrounding agricultural land, which often has not been replotted for agricultural purposes. Where the replotting of building land under governmental supervision has not as yet been introduced, great expense is incurred by developers in aggregating small holdings so as to obtain lots large enough to divide and sell as building lots. This expense is, of course, added to the selling price of the land; and the avoidance of this waste has been one of the great advantages of replotting statutes, both to land owners and to the public.

Replotting is sometimes useful in the more central parts of the cities. This is especially so when some disaster has destroyed the buildings and given an opportunity, not otherwise available, for much needed replanning, and the readjustment of private property lines without which replanning would be impossible. In this way, the Hungarian city of Szegadin, partly destroyed by flood, was replanned by a state commission in 1879, and the Prussian city of Brotterode, ravaged by fire, was replanned by royal order issued October 30, 1895.[70] It is seldom possible to undertake work of this sort without general legislation,[71] in the absence of which, opportunities that probably will never return are wasted, and gains that might have been wrested from the catastrophe escape never to be recovered.

Perhaps the first jurisdiction to make use of the police power for replotting building land and enact an adequate, comprehensive law to accomplish it, was the Canton of Zurich, Switzerland. This it did as a part of its Building Law of April 23, 1893. Under this law replotting of the tract in question, if for the public interest, may be undertaken by the

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uniting of small holdings and replanning them has been very extensive. Emil Klar, in his pamphlet (printed for him by Gebrüder Knauer, Frankfort on the Main) states that in Prussia twenty and one-half million hektars, or three-fifths of the territory of the kingdom, the property of over two million owners, was thus replanned. See also a recent French law, cited on p. 514 of this work; and, generally, an article by Dr. Richard T. Ely in the *American Economic Review,* March, 1911, entitled "Russian Land Reform."

[70] *Gesetz Sammlung* or Collection of Laws of Prussia for 1895, p. 551, approved by the law of April 26, 1896 (*Gesetz Sammlung,* p. 82).

[71] Under such general legislation special commissioners, to do the work in special cases, are often provided for.

authorities on their own motion or on petition of the land owner; and the authorities shall replot if a petition to do so is filed by a majority in number of the land owners who also own more than half the area involved. The procedure is to throw the land, including the streets and other public areas, into a common mass, deduct the areas for public uses, replan and resubdivide the area, and return the remainder of the private land to the original owners, so far as possible, in the same proportion in value as that in which it was contributed, minor adjustments being made in cash. There must be an established street or building plan for the area before replotting is begun.

There are now many replotting statutes in Switzerland,[72] Austro-Hungary [73] and Germany, more or less similar to the Zurich law.[74] Perhaps the most important modern replotting statutes are to be found in Hamburg, Baden, Saxony and Prussia.[75] The Prussian law, called the "Lex Adickes" after its author, the famous Chief Bürgermeister or Mayor of Frankfort-on-the-Main is the most detailed. Probably the greatest accomplishment of that statute has been the encouragement it has given to voluntary replotting, now so common in Frankfort as to render an actual resort to the law unusual; for the existence of the law makes it impossible any longer in that city for one or two crafty land owners, with a view to being bought off, to block an improvement which is for the advantage of the land owners as a whole, and of the entire community.[76]

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[72] See with regard to replotting in Switzerland, Fehr, *Die Grundsätze des schweitzerischen Quartierplanerfahrens,* 1913.

[73] See Sitte, Enteignungsgesetz und Lageplan, *Der Städtebau,* for 1904, No. 1, p. 5-7, in opposition to replotting in Austria.

[74] For references to and in many cases the text of excess and zone condemnation and replotting provisions in Switzerland, Austro-Hungary, Germany and other countries, up to 1897, see *"Die Umlegung Städtischer Grundstücke und die Zonenenteignung"* by Baumeister, Classen and Stübben, Ernst Toeche, Berlin, 1897.

[75] For the references to these statutes and a translation of the "Lex Adickes," with an abstract of the most important provisions of the other laws which are dissimilar, see Note A, No. 3, on p. 105 of this work.

[76] The replotting provisions of the recent Salonika Town Planning act, drafted by a Commission of English and French experts, are summarized by John W. Mawson, at that time Town Planning Adviser to the Ministry of Communications, in the December Number of the English *Town Planning Review.* In August, 1917, Salonika was totally destroyed by fire for the fifth time, and the statute was passed to take advantage

Note A

No. 1. The English Unhealthy Areas Act

This act is one of the "Cross Acts," passed in 1875. In 1890 the act, as from time to time amended, was consolidated with a mass of other housing legislation, some of it dating as far back as 1851. That consolidation is known as the "Housing of the Working Classes Act, 1890." The act of 1890 has been amended from time to time; and all this legislation is now known as the "Housing Acts, 1890 to 1919."

The unhealthy areas act is here given in its amended form. It is an act for the condemnation and replanning of large unhealthy areas. The Housing of the Working Classes Acts, 1890-1909 contain provisions also (1) for the condemnation and replanning of small unhealthy areas (2) for the closing or demolition of houses unfit for habitation (3) for the demolition of "obstructive" buildings rendering other buildings insanitary (4) for the erection of houses in certain cases. The act has had a great influence in other countries, and statutes modeled on it have been passed in many parts of the British Empire.[77]

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of this great opportunity to replan it. The first act of the government was to issue a Royal decree prohibiting the erection or repair of any building prior to the adoption of the new law. A survey and plan of the city were then made. Under the Greek constitution the government was obliged to pay immediately the full value of the property; for which purpose it had no available funds. The owners of property in the burnt district were therefore, by virtue of the act, incorporated as a property owners association for the purpose of executing the new scheme, and all individual rights and titles extinguished; each property owner was made a shareholder in the company to the amount of the value of his individual holding; and the management of the company was given to the government. A careful method of valuing the property thus forcibly taken over by the company was adopted, the property owner being given a hearing and right of appeal. In exchange for his property each owner received state bonds, which he was forbidden to sell, but on which, as collateral, the National Bank of Greece was authorized to advance to him seventy-five per cent of their face value. The city was then replanned and replotted, and the sale of the new lots arranged for, the owners of the bonds having the right to turn them in, at their face value, in payment for any lots purchased by them. Other things being equal, the preference was given, in purchasing, to the old property owners. They also received fifty per cent of any profit realized by the company, the other fifty per cent going to the municipality of Salonika, to be expended in the construction of public buildings.

[77] New Zealand, Consolidated Stats., Vol. IV, No. 124, p. 293 (Munic. Corps.); Bengal, Calcutta Improvement Act, 1911; Code (4th ed.), Vol. III, p. 701. See in this connection Richards; Bombay, Act of 1898, No. IV.

The Housing of the Working Classes Act, 1890

PART I

SCHEME BY LOCAL AUTHORITY

. . . . . .

Local authority on being satisfied by official representation of the unhealthiness of district to make scheme for its improvement.

4. Where an official representation as hereinafter mentioned is made to the local authority that within a certain area in the district of such authority either—

(*a*) any houses, courts, or alleys are unfit for human habitation, or

(*b*) the narrowness, closeness, and bad arrangement, or the bad condition of the streets and houses or groups of houses within such area, or the want of light, air, ventilation, or proper conveniences, or any other sanitary defects, or one or more of such causes, are dangerous or injurious to the health of the inhabitants either of the buildings in the said area or of the neighboring buildings;

and that the most satisfactory method of dealing with the evils connected with such houses, courts or alleys, and the sanitary defects in such area is an improvement scheme for the rearrangement and reconstruction of the streets and houses within such area, or of some of such streets or houses, the local authority shall take such representation into their consideration, and if satisfied of the truth thereof, and of the sufficiency of their resources, shall pass a resolution to the effect that such area is an unhealthy area and that an improvement scheme ought to be made in respect of such area, and after passing such resolution they shall forthwith proceed to make a scheme for the improvement of such area.

Provided always, that any number of such areas may be included in one improvement scheme.

Official representation, by whom to be made.

5. (1) An official representation for the purposes of this part of this Act shall mean a representation made to the local authority by the medical officer of health of that authority, and in London made either by such officer or by any medical officer of health in London.

(2) A medical officer of health shall make such representation whenever he sees cause to make the same; and if any justice of the peace acting within the district for which he acts as medical officer of health, or six or more persons liable to be rated to the local rate complain to him of the unhealthiness of any area within such district, it shall be the duty of the medical officer of health forthwith to inspect such area, and to make an official representation stating the facts of the case, and whether in his opinion the said area or any part thereof is an unhealthy area or is not an unhealthy area.

Requisites of improvement scheme of local authority.

6. (1) The improvement scheme of a local authority shall be accompanied by map, particulars, and estimates and

(*a*) may exclude any part of the area in respect of which an official representation is made, or include any neighboring lands, if the local authority are of the opinion that such exclusion is expedient or inclusion is necessary for making their scheme efficient and

(*b*) may provide for widening any existing approaches to the unhealthy area or otherwise for opening out the same for the purposes of ventilation or health; and

(*c*) shall provide such dwelling accommodation, if any, for the working classes displaced by the scheme as is required to comply with this Act; and

(*d*) shall provide for proper sanitary arrangements; and

(*e*) may provide for any other matter (including the closing and diversion of highways), for which it seems expedient to make provision with a view to the improvement of an area or the general efficiency of the scheme.

(2) The scheme shall distinguish the lands proposed to be taken compulsorily.

(3) The scheme may also provide for the scheme or any part thereof being carried out and effected by any person having such interest in any land comprised in an improvement scheme as may be sufficient to enable him to carry out and effect the same, or with the concurrence of such person, under the superintendence and control of the local authority, and upon such terms and conditions to be embodied in the scheme as may be agreed upon between the local authority and such person. . . .

*(The act goes on to provide for:—the confirmation of the scheme, provisionally, by the Local Government Board (or in the County or City of London, by a Secretary of State) and finally, by act of Parliament; an inquiry by the confirming authority on the neglect or refusal of the local authority to act; and an order, when necessary or proper, by the confirming authority to the local authority to prepare and execute a scheme; the provision on or near the same area for the housing of as many persons of the working classes as were displaced—but this provision may be wholly or partly waived; the execution of the scheme by purchasers, trustees, lessees, etc., subject to proper conditions as to size and design of houses, etc.; an inquiry as to the unhealthy areas on petition of rate payers, upon default of the medical officer; the revocation by the Local Government Board of unreasonable local bye-laws; etc.

* Summarized.

No. 2. The French Expropriation Law of 1841 [78] as Amended by the Excess Condemnation Law of 1918

TITLE I. PRELIMINARY PROVISIONS

Art. 1. Expropriation for public use shall be by authority of justice.

[Art. 2.] The courts shall grant expropriation only when its utility has been established and declared in the forms prescribed by the present law.

These forms consist,

1st. In the law or [royal ordinance] *decree* authorizing the [execution of the work] *transaction* for which the expropriation is claimed;

2nd. In the act of the prefect designating the places or tracts of land where the [work] *transaction* shall be prosecuted, when such designation does not result from the law or the [royal ordinance] *decree.*

3rd. In the subsequent administrative decree by which the prefect fixes the limits of the particular pieces of land to which expropriation shall apply.

This application shall not be made to any particular piece of property until the parties interested have been given an opportunity to be heard, in accordance with the provisions contained in title II.[79]

Art. 2. *The expropriation not only of the area included within the limits of the proposed public works, but also of all those areas which are found to be necessary to secure to these works their full value, present or future, may be declared a public utility.*

This may, more particularly, be done in the case of urban highways, with regard to the areas outside the alignment which are an obstacle to the proper lot subdivision or are not suitable for the sites

[78] Passed May 3, 1841; to be found in the *Bulletin des lois* for that year, No. 9285, p. 601. It is here given as amended by the laws of April 21, 1914 (*Bull. des lois,* No. 2926, p. 1103), November 6, 1918 (*Bull. des lois,* No. 13222, p. 2501, and July 17, 1921 (*Bull. des lois,* No. 19639, p. 3097. The text is that of the law of 1841, with repealed matter enclosed in brackets [ ], and matter added by the later laws in *italics.* The amendments indicated are those made by the law of 1918 unless otherwise stated; in the occasional portions of the law which are given in summary, however, it has not in all cases been possible to distinguish between the original acts and amendments, or, when this is shown, to state by what law the amendments were made.

[79] The only substantial changes in this article made by the law of 1918 are the substitution of the word "transaction" for "work" wherever it occurs; the old word not being descriptive of condemnation to obtain the increase in value in the neighborhood of the work, etc., which the law of 1918 introduces.

of structures which are in accordance with the general plan of the works.

Art. 2 bis. The expropriation of land which because of its proximity to a proposed public work will thereby be raised in value more than 15%, may also be declared to be a public utility.

ART. 3. All great public works, [royal] *national* highways, canals, railways, canalization of rivers, harbors and docks, the construction of which is undertaken by the State [departments, communes], or by private companies, with or without tolls, with or without subsidy from the Treasury, with or without the alienation of public domain, shall be authorized only by a law [which shall be passed only after an administrative inquest.[80]

A royal ordinance shall suffice as authorization for the construction of departmental highways, canals, and branch railways of less than twenty thousand metres in length, of bridges and of all other works of minor importance.

This ordinance shall also be preceded by an inquest.

These inquests shall be in form as determined by a rule of public administration].

The construction of canals and branch railways of less than twenty thousand metres in length, of missing links in or the relocation of the lines of national highways, of bridges and all other enterprises of minor importance may be authorized by decree in Council of State.

The construction of departmental and communal works may be authorized by simple decree.

An administrative inquest shall always be held before the passage of the decree or law.[81]

Art. 3 bis. When, under art. 2 or 2 bis, there is occasion to extend the expropriation to realty situated outside the line of the proposed work, the authorization can be given only by a law or a decree in Council of State.

This law or decree shall fix the zone in which it shall apply, in accordance with the reason for the extension of the expropriation to it. The law or decree shall also determine the mode of utilization of the lots not included in the public work, and, in due course, the restrictions to which on resale these lots shall be subject.

Under article 2 bis an expert examination shall be made as a part of the administrative inquest, with a view to the determination of the amount of the increase in value.

The form of this expert examination shall be governed by a rule of public administration.

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[80] Public hearing.

[81] The only change made in this article of the law of 1841 by the law of 1918 is in consolidating it with the senate decree of December 25, 1852, article 44 of the law of July 27, 1870, and the laws of August 11, 1871, and July 27, 1880, modifying it.

TITLE II. ADMINISTRATIVE ACTS WITH RELATION TO EXPROPRIATION

ART. 4. The engineers or other technicians entrusted with the execution of the work, shall make a plan for that portion of the work situated in each commune, with lot boundaries of the lands or buildings the taking of which appears to them to be necessary.

ART. 5. The plan of each of said properties showing the names of each proprietor as of record, shall remain for eight days on deposit at the office of the mayor of the commune in which the properties are situated, in order that each proprietor may have the opportunity of acquainting himself with it.

ART. 6. The time fixed in the preceding article shall begin to run at the date of notice, which shall be given to all the parties interested, to take note of the plan deposited at the office of the mayor.[81a]

This notice shall be published in the commune at the sound of the trumpet or drum and posted either at the principal [doorway of the church of the locality or at that of the communal house] *office of the mayor or at some other spot conspicuous and much frequented by the public, which shall be designated by an administrative decree of the municipality.*[82]

It shall also be inserted in one of the papers published in the arrondissement, or, if there is no such paper, in one of the papers of the department.

ART. 7. The mayor shall certify to these publications and postings of notices; he shall state, in an official report which he shall make for that purpose and that the parties who appear are required to sign, the allegations and claims which have been made to him verbally, and annex those which have been sent to him in writing.

ART. 8. At the expiration of the period of eight days prescribed by article 5, a commission shall meet at the principal seat of the subprefecture.

This commission, presided over by the sub-prefect of the arrondissement, shall be composed of four members of the general council of the department or of the council of the arrondissement, chosen by the prefect, of the mayor of the commune where the properties are situated and of one of the engineers charged with the execution of the work.

No session of the commission shall be held unless at least five of its members are present.

When there are six members present, and a tie occurs, the vote of the presiding officer shall decide.

[81a] This paragraph was stricken out by the law of 1918 and restored by the law of 1921.

[82] Since the passage of the law of April 20, 1910, the church has been classified as a historical monument, upon which it is illegal to post bills, etc.

The owners of the properties the expropriation of which is in question, are not eligible for membership in the commission.

ART. 9. The commission shall be in session to hear the owners for eight days.

It shall call them before it whenever it deems such a course proper. It shall give its advice.

Its business shall be completed within a period of ten days, after which the report shall be made at once by the sub-prefect to the prefect.

In case its business has not been finished within the above named period the sub-prefect shall within three days thereafter send to the prefect his report and the documents received.

ART. 10. If the commission suggests any change in the plan proposed by the engineers, the sub-prefect shall, in the manner prescribed in article 6, give notice thereof immediately to the owners who are affected by such changes. During eight days from the date of such notice, the official report and the papers in the case shall remain deposited at the sub-prefecture; and the parties interested shall have the right, without removing them, to inspect them without charge and be heard with regard to them in writing.

Within the following three days the sub-prefect shall transmit all the papers to the prefect.

ART. 11. On inspection of the official report and the documents annexed thereto, the prefect shall by administrative decree, giving reasons, designate the properties which shall be taken, and shall state the time when it will be necessary to take possession of them. Whenever in consequence of the advice of the commission there may be occasion to modify the plan of the work ordered, the prefect shall suspend proceedings until the matter has been decided by the superior administrative authorities.

The superior administrative authorities shall have the right, according to the circumstances of the case, either forthwith to decide the question themselves or to order that the procedure laid down in the preceding articles shall in whole or in part be gone through with again.

ART. 12. The provisions of articles 8, 9 and 10 shall not apply to expropriation demanded by a commune or in an interest entirely communal, nor to the work of opening or relocating the lines of local highways.

In such cases the official report prescribed by article 7 shall be sent, with the opinion of the municipal council, by the mayor to the sub-prefect, who shall send it to the prefect with his advice.

The prefect, in council of prefecture, on inspection of the official report and without the approval of the superior administrative authorities, shall render his decision as provided in the preceding article.

TITLE III. OF EXPROPRIATION AND ITS CONSEQUENCES WITH REGARD TO SECURED DEBTS, MORTGAGES, REAL RIGHTS

ART. 13. If the property of minors, those deprived of civil rights, absent persons, or other incapables, are included in the plans deposited in accordance with the provisions of article 5, or the modifications of it allowed by the superior administrative authorities under the provisions of article 11 of the present law, tutors, those who have been placed in temporary possession and all representatives of incapables, may after authorization by the court given on their petition without proof or other proceedings of any kind[83] in chambers with the consent of the public minister, voluntarily agree to the alienation of said property.

The court shall make such stipulations for the preservation or reinvestment of the property as it deems necessary.

These provisions are applicable to dotal and entailed real estate.

Prefects may in the same manner alienate the property of departments, when authorized so to do by resolution of the council general; mayors or administrators may alienate the property of communes or public institutions, when authorized so to do by resolution of the municipal council or administrative council, ratified by the prefect in council of prefecture.

The minister of finance may consent to the alienation of the property of the State, or of those interested in an endowment of the Crown, on the advice of the commissioner of the civil list.

In default of agreement either with the owners of the lands or buildings the cession of which is considered necessary, or with those who represent them, the prefect shall transmit to the King's attorney in the jurisdiction in which the property is situated, the law or ordinance which authorizes the execution of the work, and the administrative decree mentioned in article 11.

ART. 14. Within three days and upon the production of the documents showing that the formalities prescribed by article 1st of title 1st and by title II of the present law have been fulfilled, the attorney for the [King] *republic* shall demand and the court shall pronounce the expropriation for public use of the lands or buildings indicated in the administrative decree of the prefect.

In all cases, in so far as the realty of which the expropriation is authorized by virtue of article 2 bis is concerned, the same shall be adjudged only conditionally and only in cases where at the expiration of the period of eight days fixed by article 39, the option offered shall not have been exercised in favor of the indemnity of excess value.

If within a year from and after the administrative decree of the prefect, the authorities have not proceeded with the expropriation,

[83] *Simple requête.*

the owner of each of the pieces of realty included in said decree may present his petition to the court. The attorney for the [King] *republic* shall notify the prefect of the filing of the petition; the prefect shall as speedily as possible send the papers and the court shall render its decision within three days.

*Paragraphs 4 and 5: procedural provisions.

In case the owners of the land to be expropriated consent to its cession, but there is no agreement on the price, the court shall order the execution of an instrument of cession and shall designate the magistrate director of the jury; in which case it shall not be necessary to render judgment of expropriation or to make sure that the formalities prescribed by title II have been fulfilled.

ART. 15. The judgment shall be published and an abstract of it posted in the commune in which the property is situated, in the manner indicated in article 6. It shall also appear in a paper published in the arrondissement, or if there is none such, in a paper published in the department.

This abstract, containing the names of the owners, the reasons for and the dispositions of the judgment, shall be served on such owners at the residences that they have chosen in the arrondissement in which the properties are situated, by a statement made at the office of the mayor of the commune in which the property is situated, and in case an election of domicile has not taken place, the notice containing the summary shall be given in duplicate to the mayor and to the farmer, tenant, care taker, or steward of the property.

A third copy shall also be sent by registered letter, with return receipt required for delivery, to the person to be expropriated, if his residence appears on the land survey register.

All other notices prescribed by the present law shall be given in the manner above provided.

ART. 16. The judgment, immediately after compliance with the formalities prescribed by article 15 of the present law, shall be recorded at the bureau for the conservation of mortgages of the arrondissement in conformity with article 2181 of the civil code.

ART. 17. Within two weeks of such record, secured debts, and mortgages by agreement, by court decree or by force of law, shall be registered.

In default of registration within this period the realty expropriated shall be free of all liens and mortgages of all sorts, without prejudice to the rights of women, minors or those deprived of civil rights against the amount of compensation, in so far as it has not been paid or the order in which creditors shall be paid has not been finally determined.

The creditors registered shall not in any case be entitled to tender

* Summarized.

the amount for which the realty was sold and have it sold again;[84] but they may demand that the compensation shall be fixed in accordance with title IV.

ART. 18. No action of annulment or recovery of the property or any other real action shall suspend the expropriation proceedings or prevent expropriation from going into effect. The rights of claimants shall be transferred to the money payment and the realty shall be free of their claims.

ART. 19. The rules laid down in the first paragraph of article 15, and in articles 16, 17 and 18, are applicable to voluntary agreements made between the authorities and the owners.

Nevertheless, the authorities may, without prejudice to the rights of third parties, and without complying with the formalities prescribed above, pay for property acquired the value of which does not exceed [500] *1500*[84a] francs.

The failure to comply with the formalities for freeing the property from mortgage claims shall not delay the expropriation; which shall not prejudice the rights of interested parties in the enforcement of their claims, subsequently, in the manner prescribed in title IV of the present law.

ART. 20. The judgment can be attacked only by recourse to proceedings for its annulment; and this can be claimed only for excess of authority or defects in the form of judgment.

Proceedings for this purpose may be begun not later than within three days from the date of the notice of the judgment, by statement to that effect filed with the clerk of the court. Notice thereof shall be given within a week, either to the party at the domicile indicated in article 15 or to the prefect and to the mayor, as the case and the nature of the work may be, all on pain of forfeiture of the right to proceed.

Within two weeks of the notice of appeal the papers in the case shall be sent to the civil division of the court of cassation, which shall render its decision before the expiration of the following month.

The judgment, if it is rendered by default, at the expiration of the prescribed period, shall be final.

TITLE IV. WITH REGARD TO THE FIXING OF COMPENSATION

Chapter I. Preliminary Proceedings

ART. 21. Within the week following the notice provided for in article 15, the owner shall summon and give the authorities the names of the farmers, tenants, those entitled to usufruct, habitation or use, as provided by the civil code, and those who are entitled to servitudes

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[84] *Surenchérir.*

[84a] Amendment made by law of 1921.

under title derived from the owner or by other acts to which he has been a party; and on his failure so to do, he shall remain alone charged, as regards them, with the compensation to which they have claim.

Others interested must enforce their rights by the notice provided for in article 6 and acquaint the authorities with their claims within the same period of one week; in default of which they shall forfeit all rights to compensation.

ART. 22. The provisions of the present law relative to owners and their creditors are applicable to the usufructuary and his creditors.

ART. 23. The authorities shall notify the owners and all others interested who have been made parties or who have intervened within the time fixed by article 21 of the sums which the authorities offer as compensation [.] *for eviction, and, later, those which they demand as compensation for increase in value in excess of 15%.*

These offers *and demands* shall also be posted and published in conformity with the provisions of article 6 of the present law.

ART. 24. Within the next two weeks the owners and others interested shall declare their acceptance or, if they do not accept the offers made them, shall state the amount of their claims.

ART. 25. Married women under the dotal régime in the presence of their husbands, tutors, those who have been put into temporary possession of the property of absent persons, and other persons who represent incompetents, may give binding assent to the offers mentioned in article 23, when authorized thereto in form as prescribed in article 13.

ART. 26. Ministers of finance, prefects, mayors or administrators may accept offers of compensation for the expropriation of property belonging to the State, to the Crown, to departments, communes, or public institutions, under the forms and with the authorizations prescribed in article 13.

ART. 27. The period of two weeks, fixed by article 24, shall be one month in the cases provided for in articles 25 and 26.

ART. 28. If the offers of the authorities are not accepted within the periods named in articles 24 and 27, the authorities shall call before the jury, which shall be convoked for the purpose, the owners and all others interested who have been summoned or who have intervened, in order that the compensation may be fixed in the manner indicated in the following chapter. The citation shall contain a statement of the offers which have been refused.

Chapter II. With regard to the Special Jury to Fix the Compensation

*Arts. 29-38. Method of choosing the jury of six.[85]

ART. 39. The jury shall award separate damages in favor of each of the parties claiming compensation by different titles, such as owners, farmers, tenants, those having the right of use, and others interested, mentioned in article 21.

With regard to realty the expropriation of which is claimed by reason of increase in value, the jury shall make awards first of the compensation due for increase in value of the realty in excess of 15%, and then of the compensation due in the event of the expropriation of the realty.

In the case of a usufruct, a single compensation shall be fixed by the jury for the value of the realty as a whole; the claim of the owner of the reversion and the usufructuary shall be against the total amount of the compensation instead of against the property.

The usufructuary shall be required to give bond; the father and mother having the legal usufruct shall alone be relieved of this requirement.

Whenever there is litigation with regard to the legal basis of a claim or the title of claimants, and in all cases in which objections are raised foreign to the fixing of the amount of the compensation, the jury shall fix the compensation without regard to these contests and objections; as to which the parties shall have recourse to suit to establish their rights.

The compensation awarded by the jury shall not, in any case, be less than the offers of the authorities nor more *either* than the claim of the party interested [.] *or the claim for increase in value.*[85a]

ART. 40. If the compensation fixed by the jury does not exceed the offer of the authorities, the parties who have refused the offer shall be taxed with the costs.

If the compensation is equal in amount to the claims of the parties, the authorities shall be taxed with the costs.

If the compensation is both larger than the offer of the authorities and smaller than the claim of the parties, the costs shall be taxed

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* Summarized.

[85] Articles 29, 30, 31, 33, 34 and 35 were amended by the law of November 6, 1918; and article 38, by the law of April 21, 1914.

[85a] See in this connection the law of May 27, 1918, which provides (sec. 6) that in expropriation "the jury shall take as the basis of their valuation . . . the value derived from the returns made by those liable for taxation, or administrative valuations not contested or become final by virtue of fiscal laws." The jury can vary this valuation only on account of changed circumstances necessitating it. See Berthélemy, *Droit Administratif*, 9th ed., 1920, p. 640.

against the authorities and the parties in the ratio of the offer or claim [with] *before* the verdict of the jury.

When the expropriation has been prosecuted by reason of the increase in value, the costs shall be taxed in accordance with the same rules, taking into consideration in that case, the claim for compensation for increase in value made by the authorities and the offer of the parties.

Every person claiming compensation who does not come within the provisions of articles 24 and 25, shall be taxed with costs irrespective of the ultimate verdict of the jury if he has failed to conform to the provisions of article 24.

In no case shall the share of the costs taxed against a party expropriated exceed the amount of compensation awarded him; the excess shall remain a charge against the authorities expropriating.

ART. 41. The verdict of the jury, signed by the members who have concurred in it, shall be [sent by the president to] *read by* the magistrate director who shall declare it to be a true verdict, pass on the costs and, *subject to the provisions of article 14, paragraph 2 [and 3]*[85b], *shall* put the authorities into possession of the property, subject to the obligation to conform to the dispositions of articles 53, 54, and following articles.

Every juror who without good reason shall refuse to sign a verdict in which he has concurred shall be subject to the fine provided for in article 32.

Every verdict signed by the magistrate director and at least four jurors shall be valid.

The magistrate *director* shall tax [the] *all* costs [and the tariff of the same shall be fixed by a rule of public administration] *and expenses which ought to be paid by the authorities and by the parties expropriated as provided in article 40.*

The costs so taxed shall *not* include [only expenses for things done subsequent to the offer of the authorities: those for things done prior thereto] *the expenses of contracts or other proceedings rendered necessary by the offer made in carrying out the provisions of article 23 nor those incurred prior to such offer; these expenses* shall remain in every case a charge against the authorities.

Jurors shall receive on demand mileage and reimbursement for living expenses while detained on duty, the amount of which shall be fixed by a rule of public administration. These expenditures shall be taxed by the magistrate director and paid as urgent expenses.

ART. 42. The verdict of the jury and the order of the magistrate director can be attacked only by recourse to proceedings to set it aside for errors of law, for violation of the provisions of the first paragraph of article 30, of article 31, of the second and fourth paragraphs of article 34, [and] of articles 35, 36, 37, 38, 39, 40 [.], *the*

[85b] Stricken out by law of 1921.

fourth paragraph of article 48, and articles 78, 79 and 80. Such proceedings must be begun within a period of fifteen days, and shall be brought, notice given and decided as provided in article 20; this period shall begin on the day on which the verdict is rendered.[86]

*Arts. 43-47. Procedural provisions.

Chapter III. Rules to Be Followed in Fixing Compensation

ART. 48. The jury is the judge of the genuineness of title deeds and of the effect of contracts which may vary the estimate of the amount of the compensation.

† *Paragraphs 2 and 3. Criminal procedure in cases where any document produced is thought to be fraudulent or forged.*

Damages for expropriation shall include only actual and certain damage caused by the eviction itself; it shall not include injury which is uncertain or contingent and not the direct consequence of the expropriation. If in the progress of the trial any act of the expropriant is shown which he considers as the basis of a claim of this nature, the jury shall pass on this claim by a separate finding.[87]

ART. 49. In case the authorities contest the right to compensation of a party in possession expropriated, the jury, without suspending proceedings on account of the contest, which it shall leave to be determined in another proceeding, shall fix the compensation as if due, and the magistrate director of the jury shall order the deposit of such compensation until the parties have come to an agreement or the litigation is terminated.

ART. 50. Buildings a part of which it is necessary to acquire for public use shall be bought entire, if the owners so require by formal demand addressed to the magistrate director of the jury, within the periods named in articles 24 and 27.

This shall also be done in the case of every tract of land which by reason of the taking, is reduced to a quarter of its former total area, provided the owner does not possess any land immediately contiguous and the tract thus reduced in size is less than ten ares.[88]

ART. 51. If the execution of the work will produce an immediate and special increase in value to the remainder of the property, this increase shall be taken into consideration in fixing the amount of compensation.

ART. 52. Structures, cultural additions, and improvements shall not give rise to any right to compensation when by reason of the

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* Summarized; see laws of 1918 and 1921.

† Summarized.

[86] The amendments were made by the laws of April 21, 1914, and July 21, 1921.

[87] Paragraphs 2 and 3 were added by the law of November 6, 1918; paragraph 4 by the law of April 21, 1914.

[88] An are is equal to 100 square metres.

time when they were made, or any other circumstance coming to the knowledge of the jury it believes that they were made with a view to obtaining an increased compensation.

TITLE V. OF THE PAYMENT OF COMPENSATION

ART. 53. The damages awarded by the jury shall be paid into the hands of those entitled to receive them before possession is taken.

If any person refuses to accept the amount awarded him, possession shall be taken after tender and deposit.

*Paragraphs 3-5, method of payment.

The person expropriated, designated in the verdict of the jury as owner and not inscribed in the communal rôles, must, in order to obtain payment of the compensation awarded to him, prove his title to the property.

Every farmer, tenant usufructuary or other person having a claim against the expropriating authorities, or intervening under the conditions laid down in article 21, in order to obtain payment of the compensation awarded to him, is equally under the obligation to prove his right to it.

The sums awarded as compensation for which no sufficient title is established, shall be deposited by the authorities expropriating at the deposit and consignment office and remain there on deposit as provided in article 49.

† ART. 54. Method of paying incumbrancers.

ART. 55. If within six months from and after the rendering of the judgment of expropriation the expropriating authorities do not proceed to the fixing of compensation the parties may demand that these authorities proceed to such fixation.

When the compensation is fixed, if it is neither paid nor deposited within six months from and after the rendition of the verdict of the jury, those interested shall, after the expiration of that period, be vested with the full right to the same.

TITLE VI. VARIOUS PROVISIONS

† ARTS. 56-59. Procedural provisions.

ART. 60. If the lands acquired for works of public utility are not so employed *or if realty acquired by virtue of articles 2 and 2 bis is not used in conformity to the law or decree declaring it of public utility,* the former proprietors or their assigns shall be entitled to demand its retrocession.

The price of land retroceded shall be fixed by agreement, or, in lack of agreement, by a jury in the manner above prescribed. The

* Summarized; see laws of 1918 and 1921.
† Summarized.

amount fixed by the jury shall not in any case exceed the sum for which the lands were acquired.

ART. 61. A notice, published in the manner provided in articles 6, shall make known the lands which the authorities are about to resell. Within three months of such publication the former owners who wish to reacquire the ownership of such lands shall give notice to that effect; and within one month of the fixing of the price, by agreement or by the court, they shall execute the contract of repurchase and pay the price; all on pain of forfeiture of the privilege accorded to them by the preceding article.

ART. 62. The provisions of articles 60 and 61 are not applicable to lands acquired on the demand of the owner by virtue of article 50 and which remain undisposed of after the execution of the work.

ART. 63. Concessionaires of public works shall exercise all the rights conferred upon the authorities and shall be subject to all the obligations imposed upon these authorities by the present law.

ART. 64. Owners of tracts or parts of tracts of land surrendered or expropriated for public use shall continue to be considered such [for electoral purposes for one year from the time of parting with the property] *for the purposes of taxation and similar purposes until the first day of January following the cession or judgment pronouncing expropriation.*[89]

TITLE VII. PROVISIONS FOR SPECIAL CASES

Chapter I

*ARTS. 65-74. Summary procedure in cases of urgency.

Chapter II

† ARTS. 75-76. Expropriation for military, temporary, etc., purposes.

TITLE VIII. OF CONDITIONAL EXPROPRIATION[89a]

ART. 77. *The administrative decree giving the right to take the properties in question, provided for in article 11, may be preceded by a decree for the calling of the jury of expropriation, made by the prefect on motion of the authority expropriating, based upon the statement of such authority that it will not proceed with the expro-*

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* Summarized.

† Summarized; see laws of 1918 and 1921.

[89] The amendment is due to the fact that there is no longer a property qualification for voting in France; and the desire to have a convenient rule on the subject.

[89a] This title is added by the law of 1921, title VIII, art. 77 of the old law becoming title IX, art. 84.

priation until the total amount of the damages therefor has first been fixed.

ART. 78. *The decree for the calling of the jury shall be transmitted by the prefect to the president of the court which will hear the case. He shall move for the appointment by the court in chambers of the magistrate director of the jury. The jury shall be constituted and convoked in the manner provided in articles 29, 30 and 31. It shall fix the damages to which the parties shall be entitled on final expropriation, as provided in articles 32 to 40, inclusive, in accordance with the provisions of title IV, chapter III, and shall render a verdict fixing, with regard to each of the parties to the proceeding, the damages which will be due him if the authority expropriating discontinues the expropriation proceeding; in which event damages shall not, with respect to any party, exceed one per centum (1%) of the full amount of the damages fixed in his case, nor more than five hundred francs (f 1500).*[89b]

ART. 79. *The decree for the calling of the jury shall be published, posted and served as prescribed in article 15 for a judgment of expropriation. Notice imposes upon each owner notified and upon the expropriating authority, the obligations provided for in articles 21 to 28, inclusive.*

ART. 80. *The verdict of the jury shall be signed by the members of the jury who concur in it. The magistrate director shall tax the costs as provided in article 41.*

ART. 81. *Within the month following the verdict of the jury, the prefect shall give the expropriating authority notice of the same, and notice that it is required to state within the time fixed whether it will continue the proceeding. If the said authority does not give its decision within three months from and after the date of the verdict of the jury, it shall be deemed to have discontinued the proceeding.*

ART. 82. *If the expropriating authority declares that it will pursue the expropriation, the prefect, by a decree giving his reasons, shall designate the properties which shall be taken, as provided in article 11, and thereafter the expropriation shall proceed as provided in articles 13 to 20, inclusive, the president of the jury shall declare the verdict of the jury to be a true verdict, and put the expropriating authority in possession of the properties, subject to the obligation to comply with the provisions of articles 53 and 54.*

ART. 83. *The above provisions shall apply, with the modifications hereinbelow stated, in all cases of expropriation by reason of increase in value. Within eight days from the date of the verdict of the jury, the owner shall elect between the indemnity for the increase in value and the damages for expropriation; in default of which election the*

[89b] So in original.

indemnity for the increase in value shall be deemed to have been chosen. If the owner elects to accept the damages for the expropriation, the authority may, within eight days from and after the date of the notice of such election, give notice that it discontinues the expropriation, and such discontinuance shall not give the right to special damages provided for by article 78. In default of such discontinuance within the time fixed the prefect shall pass the decree giving the right to take the properties in question, and the proceeding shall continue as provided in article 82.

TITLE IX. FINAL PROVISIONS

ART. 84. The laws of March 8, 1810, and July 7, 1833, are repealed.

NO. 3. GERMAN REPLOTTING LAWS

The most widely known of the German replotting laws are those of Hamburg, Saxony, Baden, and especially Prussia.[90] The Prussian law is the most complete. It is called the "Lex Adickes," after its author, the famous chief Bürgermeister or mayor of Frankfort-on-the-Main. It applied at first only to Frankfort; but was from time to time extended to other cities in Prussia and was finally in the Housing Law of 1918 (see p. 466) made applicable to any commune adopting it. It was originally passed in 1902; but section 13 of the law as it then read compelled the city to pay for a larger percentage of land taken for public use than the city considered just, and the city, by refusing its coöperation, succeeded in preventing a resort to the statute to any considerable extent. In 1907, therefore, this section was amended in this respect, and the period of usefulness of the statute began. A translation of the "Lex Adickes," with references to the principal provisions in the other

[90] The full references to these statutes are as follows: HAMBURG, sec. 9 of the Law of December 30, 1892, with regard to the Building Plan for the Suburbs on the Right Bank of the Elbe, as amended from time to time thereafter. BADEN, Street Statute of October 15, 1908 (G. u. V. O. Bl., p. 605, ff.) with relation to which see Fladt, *Das badische Ortsstrassengesetz*, 1909; SAXONY, General Building Law of July 1, 1900 (G. V. Bl., p. 381), as amended May 20, 1904 (ib., p. 163, sec. 54 ff., a translation of which will be found on p. 474 of this work; and PRUSSIA, "Lex Adickes" (Law with regard to the Replotting of Building Land in Frankfort-on-the-Main) of July 28, 1902 (G. S., p. 273), amended July 8, 1907 (G. S., p. 259); extended first to a number of Prussian cities specifically, and later, by the Prussian Housing Law of 1918 (see p. 466), to all Prussian cities deciding to adopt it. The statute as extended to Cologne, July 28, 1911, was amended, in so far as that city was concerned, by the (Prussian State) law of March 28, 1919. See in this connection Emil Klar, *Die erste Bauerschliessung nach dem Frankfurter Umlegungsgesetz*, 1911. Im Selbstverlage; 12 p.

statutes referred to above, in which they differ from the "Lex Adickes," follows:

The "Lex Adickes"

Law with regard to the Replotting of Building Land in Frankfort-on-the-Main

FIRST PART

PREREQUISITES TO REPLOTTING; PRELIMINARY PROCEEDING

Sec. 1. In Frankfort-on-the-Main lots of land belonging to various owners in parts of the city that are for the most part not built up, for which the building plan is finally established, may, in the public interest, be replotted, for the purpose of obtaining building land and securing a suitable subdivision of building lots,[91] in accordance with the following provisions.

Sec. 2. The replotting shall include only a single part of the territory within the city limits[92] (replotting district). The limits of the replotting district shall be so fixed that the replotting can be suitably carried out, and shall not be greater than the purposes of the replotting require; in which connection especial attention shall be given to the topography and the streets in existence or established by the building plan (sec. 1). Particular lots in the replotting district built up or used in special ways (such as market gardens, nursery gardens, park land and the like) may be wholly or partly excluded from the replotting.[93] Lots which are designated for the permanent exercise of sovereign rights shall on the demand of the competent authority be excluded from the replotting.

Sec. 3. The replotting may be authorized:

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[91] The other laws do not expressly limit the replotting to parts of the city "for the most part not built up"; but they each declare their purpose to be the obtaining of building land; and all but the Hamburg law provide that wherever possible an improved building lot, if not excluded from the replotting, shall be reassigned to the original owner. It is evident, therefore, that the statutes were intended for application to the parts of the city not built up.

The Saxon law (sec. 55) expressly applies to "lots of land whose buildings by fire, water, or other elemental disaster, have been destroyed," but it is clear that such land has become "for the most part not built up."

[92] The other laws do not limit replotting to "a single part" of the city.

[93] The Hamburg law, which is by far the shortest, does not expressly provide for the exclusion of lots devoted to special uses, etc.

Under the Saxon law (sec. 56), "special lots of land may be excluded from the replotting on the petition either of the owners of such lots or of the other land owners" in order to avoid expense. See Rumpelt's edition of the law, Leipzig, 1911, p. 181, note, citing an authority.

1. On the petition of the executive branch of the local Council,[94] pursuant to a joint resolution of the executive branch and the communal council; or

2. On the petition of the owners of more than half of the area of the lots to be replotted, as appears on the land and building register, provided the petitioners include more than half the owners.[95] For the purpose of this calculation, when land is held by several in common, a fraction of the area of the common land equal to his proportion of ownership therein is to be credited to each such owner.

Restrictions against transfer are not a bar to replotting. Under par. 1, no. 2, the petition shall be filed with the executive branch. If in this case the replotting district is so delimited that the municipality, in accordance with sec. 13, must award compensation in money, the consent of the executive branch is necessary.

Paragraph 1, no. 1, is not applicable when the greater part of the area proposed for replotting is cultivated by the owners themselves as market gardens.

Sec. 4. If the executive branch has decided, in pursuance of the previous joint resolution of the executive branch and the council, to petition for the replotting (sec. 3, par. 1, no. 1) or if the petition of owners, provided for in sec. 3, par. 1, no. 2, has been presented to it, then it shall notify the building police authority[96] of the proposed replotting. It shall also without delay, provided it has not yet been done, draw up a schedule in which the lots to be replotted, with the names of their owners and their register, and land record description, are separately entered and in which shall be stated also the percentage of the land thrown into the common mass by the parties to the replotting, which is to be surrendered and devoted to public streets and squares (sec. 10, par. 2), and within what period the streets and squares established by the building plan in the replotting district shall be finished and ready for public traffic and for the building of structures on the land abutting on them. To the schedule a map is to be annexed on which shall appear the location, size, permissible intensity of building and particular use of the lots to be replotted. The executive branch shall throw open the schedule and map to public

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[94] The legislative branch of the city government consists of a council and an upper board called "magistrat," whose duties are for the greater part administrative.

[95] Under the Hamburg law the proceeding can be begun by the city authorities or by a petition of the owners of more than half the area involved. Under the Saxon law (sec. 54) the petition may be brought either by the city authorities or by more than half the owners of the lots involved who together own more than half the area in question. Under the Baden law the proceeding must have the support both of the city authorities and of more than half of the land owners who also own more than half the area in value.

[96] The building police are state officials.

inspection, the time and place of which shall be made public in the manner usual in the locality, with notice that objections may be presented to the executive branch within a fixed time not to be less than one month. A notice of the contents of their objections shall be served on the land owners. If the map includes lots of the kind specified in the last sentence of sec. 2, the authority concerned shall be specially notified.

Sec. 5. The executive branch shall, so far as possible, dispose of the objections raised, by consent, and then without delay transmit the petition for replotting, together with the papers relating to the matter, to the supervisory (state) committee.[97] The supervisory committee decides, after hearing the local police authorities, with regard to the existence of the conditions precedent to the replotting stated in secs. 1 to 4, and the validity of the objections not disposed of.

With the consent of the petitioners it may decide that under sec. 3, par. 1, no. 2, the costs of the proceedings shall be borne in whole or in part by them.

The resolution shall be served on the executive branch, the owners, and the parties (sec. 57) who have joined in the proceeding; and the executive branch shall make it public, with a reference to the contents of sections 7, 27 and 50, in the manner usual in the locality.

Sec. 6. The petition may be withdrawn (sec. 3) at any time prior to the rendering by the supervisory committee of its decision (sec. 5, par. 1), but not thereafter.

Under the circumstances provided for in sec. 3, par. 1, no. 2, the demand of the owners of more than two-thirds of the land area to be taken into account, under the provision in question is sufficient for the withdrawal of the petition.

The costs shall be paid by the withdrawing petitioners. Under sec. 3, par. 1, no. 2, the costs are fixed by the executive branch without appeal and may be collected by the municipality by coercive administrative proceedings.

Sec. 7. If, under sec. 3, par. 1, no. 1, an agreement[98] with regard to the replotting is made in binding legal form between the municipality and the owners, then, on petition of the executive branch and a majority of the owners, reckoned in accordance with the provisions of sec. 3, par. 1, no. 2, the replotting proceeding (sec. 8) shall not be inaugurated.

If the agreement embraces only a part of the replotting district, the replotting proceeding may be dispensed with as provided in par. 1, provided that the object of the replotting can be substantially

[97] Bezirksausschuss. Prussia is divided into provinces, the provinces into Bezirke, or large administrative units, and the Bezirke into smaller units, called Kreise, translated "districts."

[98] A translation of an agreement of this sort, made shortly before the war, will be found on p. 123 of this work.

attained although limited to the lots included in the agreement, and the owners of the remaining lots have agreed to such limitation or a later replotting of their lots is not thereby precluded. In this event the lots of the owners who have not joined in the agreement are excluded from the replotting.

In order to facilitate the making of said agreements, pars. 1 and 2, the supervisory committee may fix a suitable period prior to the expiration of which the replotting proceeding shall not be inaugurated. It shall fix such a period on petition of the executive branch, or of at least such a majority of the owners, as in the judgment of the supervisory committee under the conditions of par. 2, would together with the executive branch be authorized to present such a petition.

The decisions under pars. 1 to 3 shall be rendered by the supervisory committee in administrative proceedings. The decision under par. 3 shall be final.

SECOND PART

THE REPLOTTING PROCEEDING

1. *The Preliminary Resolution: The Replotting Commission*

SEC. 8. When the statutory prerequisites to the beginning of the replotting proceeding are finally established, then the president of the District[99] orders its beginning and names a commission to carry out the process.[1]

The commission shall have as members two deputies of the district president, of whom one shall be made chairman and the other vice-chairman, as well as at least one member who shall be an expert in building matters, one an expert in law and qualified to be a judge, one a certified surveyor, and one an expert in the appraisal of land. Members of the executive branch cannot be members of the commission.

Before the naming of the members of the commission the executive branch and the owners shall be given an opportunity to nominate and be heard with regard thereto.

The members are entitled to repayment of actual disbursements and to fees as established in the existing provisions for experts in legal proceedings.

The commission is, without prejudice to the provisions of sec. 36 par. 2, legally qualified to render its decisions when all the members are notified to be present for the purpose and the chairman or vice-

[99] In this case the larger administrative district is meant. The president is chairman of the supervisory committee.

[1] The "Lex Adickes" is the only law which provides for a special commission; in the other laws the work is done by the regular authorities.

chairman and at least half of the members are present; the decisions are by majority vote; in cases of tie the vote of the chairman decides.

The commission is in legal and other proceedings represented by its chairman.

The records of the commission are public; their register and the plan of division shall be deemed to be judicial records.

The beginning of the proceeding and the naming of the commission shall be made public in the manner usual in the locality.

2. Entry of Pendency of Replotting

SEC. 9. On the request of the commission the land record office shall enter in the land books of the lots to be replotted, the fact that the replotting proceedings have been begun (Entry of Pendency of Replotting).

It shall be the duty of the commission to obtain authentic information with regard to the contents of the land books. When necessary it shall require the land record office to give it abstracts for this purpose. Even when certified abstracts are furnished, only actual disbursements shall be charged.

The entries subsequent to the entry of the Pendency of the Replotting shall be communicated by the land record office to the commission.

In so far as the land book has not yet been established, the above provisions are applicable to the other legal books.

3. Principles of Replotting

SEC. 10. The lots noted for replotting shall be united in a single mass. In the mass shall be thrown also the existing public roads and squares.

From the common mass there shall at once be excluded in the division and assigned to the municipality or other party whose duty it is to maintain thoroughfares, the land necessary for public streets and squares. By such assignment the municipality and the other parties whose duty it is to maintain ways, shall be deemed to be compensated for the surrender of the public ways and squares.

The rest of the mass shall be divided among the owners.

SEC. 11. Full compensation in accordance with the provisions of secs. 12 to 21 shall be made to the parties (sec. 57, pars. 2 to 5) concerned in the replotting.

SEC. 12. The division of the rest of the mass mentioned in sec. 10, par. 3 shall be made in a suitable and equitable manner and, as far as possible, so that the total area shall be assigned to the owners in the proportion in which the former total mass was divided among

them.[2] In so doing the lots shall, as far as possible, be laid out at right angles to the streets and squares and in the same location in which they were before the replotting. Especial endeavor shall be made that built up lots and lots to which under sec. 14, a special value must be given, shall (except as they come within the lines of streets or squares, or must be otherwise bounded) be assigned to their former owners.

If the land thrown into the mass is, in its different parts, differently encumbered, or if the lots of the same owner differently encumbered are thrown into the mass, then for each of these parts, or for each lot, or in each case for the greater part of lots which are encumbered in the same way, at least one new lot shall be assigned.

Sec. 13. The owners shall be compensated in money for the land necessary for public ways and squares in excess of the area of such ways and squares thrown into the mass, [in so far as the land exceeds 30% of the land thrown in by the owners] *in so far as, under sec. 3, par. 1, no. 1, the land exceeds 35%, and under sec. 3, par. 1, no. 2,* it *exceeds 40% of the land thrown in by the owners.*[3]

The compensation is to be reckoned as a fraction of the total value of the land destined for streets and squares.

Sec. 14. In addition to the right to the assignment of land, the owners have also the right to compensation in money:

1. For buildings and other parts and appurtenances of the lot thrown in.

2. For the loss of value by reason of special qualities of it or investments made on it, in so far as an adequate compensation is not afforded by the lot assigned.

3. For the loss of income from the use of buildings or the special condition or use of the lot (factories, truck gardens, nurseries, clay and loam pits and the like).

An increase in value resulting from the anticipation or beginning of replotting shall not be taken into consideration in this connection.

Sec. 15. If the lot thrown in is subject to claims which, in accordance with sec. 42, par. 1, and 2, are extinguished and for which in accordance with sec. 20 compensation must be accorded, then the commission may impose upon the owner the obligation to pay a sum of money not to exceed the amount by which the value to him of the lot thrown in was diminished by the encumbrance (contribution).

The contribution shall be paid to the municipality. On demand,

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[2] Under the other laws the basis of reassignment is the ratio of value of the lot thrown in to the value of the replanned area, exclusive of streets, squares, etc.

[3] By an amendment passed July 8, 1907 (G. S., p. 259), the words in brackets were omitted, and the words in italics inserted in their place. The ratio which is appropriated without payment varies in different laws.

however, the owner shall be allowed to postpone settlement, on payment of 3½% interest, until the sale of the lot or building on it.

Sec. 16. In so far as the value of the allotments, on the basis of secs. 11 to 14, for any reason is less than the worth of the lot thrown in, the owners shall have a claim for a further compensation in money.

A greater value which the lot thrown in obtains by reason of the proposed or inaugurated replotting shall in this connection be disregarded.

The lot assigned shall be appraised at the value which it has attained, after the replotting, at the time at which it is transferred in accordance with the declaration of transfer (secs. 40 to 42).

Sec. 17. Lots thrown into the mass whose areas are so small that by themselves they could be replaced only by lots that are unfitted for building purposes are, when they belong to the same owner, to be combined.

If they belong to different owners, then, with the consent of their owners, they are to be united in common ownership, so that in their place lots capable of building development can be assigned; and the assignment is to be made with a fixing of the proportion of the ownership as held in common. The commission shall use their best efforts to bring about the necessary agreement.

If the lots which are to be united (par. 2) are differently encumbered, then the provisions of sec. 12, par. 2, shall apply.

Sec. 18. If the agreement mentioned in sec. 17, par. 2 is not reached, the full compensation for the lot thrown in shall be paid entirely in money:

1. On the petition of the executive branch, when the area of the lot is so small that for it only a lot unsuited for building development can be assigned, and when in this case the purpose of the replotting would fail of accomplishment or would be materially impaired.

2. On petition of the owner when the area in consequence of the replotting would be so lessened that the lot assigned would no longer be fitted for building purposes.

In the fixing of the compensation the provisions of sec. 16, par. 3, shall apply with the limitation that the amount of compensation shall be diminished by the amount of the contribution to the replotting that would otherwise be imposed upon the owner.

Parts of the remaining mass (sec. 10, par. 3) which would be equivalent to a lot such as is described in the first paragraph (sec. 12) may be excluded from the division to all the owners and in whole or in part, with their consent, on compensation, be assigned to one or more owners. With their consent, on payment of compensation by them, the payment of this compensation shall be imposed upon the owners to whom the assignment is made (recompense). The provisions of sec. 16, par. 3 shall apply.

SEC. 19. The commission decides as to suitability for building development (secs. 17, 18) after hearing the building police authorities.

SEC. 20. Parties whose rights in a lot are extinguished (sec. 42, par. 2 sentence 3 or in connection with par. 1, sentence 3) or changed by order of the commission (sec. 25, pars. 1, 2), as well as tenants and leaseholders whose rights, under sec. 42, par. 4, are extinguished, shall be specially compensated for the damage they suffer through the replotting, in so far as the indemnity is not included in the damages accorded them under secs. 14, 16, 18 and 31.

SEC. 21. In other respects the provisions of secs. 7 to 11 and 13 of the Law of Expropriation of Land, of June 11, 1874 (G. S., p. 221), in so far as provision therefor is not made in this law, apply as to damages, except that the municipality shall be considered the person undertaking the enterprise.[4]

SEC. 22. The building plan for the replotting district shall not be changed during the replotting proceeding without the consent of the commission. The commission may, however, as an aid to the carrying out of the replotting, petition the executive branch for a change in the building plan in the manner prescribed in the Statute with regard to the Laying Out and Change of Streets or Squares in Cities and Country Places, of July 2, 1875 (G. S., p. 561).[5]

SEC. 23. The commission, after hearing the street building police authorities, shall decide within what time the streets and squares in the replotting district shall be made ready for public traffic and for building on abutting land. A merely temporary construction may, however, be allowed for these purposes, and recognized as sufficient. The delay allowed may be different in different parts of the replotting district. After the expiration of the period, the building permit cannot be refused on the ground that the construction has not yet been done.[6] Under sec. 3, par. 1, no. 1, the delay, without prejudice to any other agreement between the municipality and the owners interested, shall not exceed the period of four years.

In so far as the planned streets and squares, up to the time of the replotting, are not constructed and the lots thereafter need temporary approaches or ways, existing public ways that are destined to be abolished or shifted may be temporarily maintained. In so far as this is not done, it shall be the duty of the municipality to construct temporary approaches and ways.

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[4] The law referred to is the general law of Prussia for the condemnation of private property for public use; and the provisions with regard to damages are very much like the laws on the subject in this and other countries.

[5] A translation of this statute will be found on p. 466 of this work.

[6] Under the Prussian law and that of a number of other states, the city can pass a local statute forbidding building on unfinished streets. The reason and effect of such a law are explained on p. 455 of this work.

On petition of the municipality this duty shall not be so imposed, and the interested owners shall receive compensation in money when the construction would be too expensive under the circumstances. This provision shall not apply when without such construction the access to a built up lot or a lot used for trade purposes, which remains in the possession of the owner, would be prejudiced.

Sec. 24. The expenditures necessary under secs. 13, 14, 16 to 23, shall be met by the municipality.

Sec. 25. In order to attain the object of the replotting proceeding the commission may maintain existing easements or change them or impose new easements.

Other real rights which, under sec. 42, par. 2, sentence 3, in connection with par. 1, sentence 3 would be extinguished may, reserving any claim for indemnity (sec. 20), be transferred by the commission to the lot assigned, in so far as they can be exercised with relation to the lot without material loss to those interested in that right and do not conflict with the objects of the replotting.

So far as necessary the commission shall also dispose otherwise of the public burdens existing on the lots as at present owned or the burdens to be imposed on its future ownership.

Sec. 26. The commission shall, so far as possible, decide upon the provisions in the plan of division, particularly those with regard to the division of the land (sec. 12), in concert with those interested, and shall use special efforts to bring about agreements through which the payment of indemnities in money shall be lessened or avoided.

It shall also take care that the procedure is directed against the right parties.

Sec. 27. If an agreement, as provided for in sec. 7, par. 1, is reached, then the commission is bound by its terms.

If an agreement, as provided for in sec. 7, par. 2, is reached, then the district committee shall decide whether the object of the replotting can be substantially attained with its limitation to the lots affected by the agreement. If this is so and if the owners of the remaining lots agree to the limitation, or if a later replotting of their lots is not thereby prevented, then the district committee shall exclude from the replotting the lots not included in the agreement. With regard to the lots affected by the agreement the provisions of par. 1, shall apply.

Agreements made by the owners of the lots in one or more blocks with regard to the replotting of their lots shall be respected, in so far as the accomplishment of the replotting in other respects in accordance with the provisions of this law shall not be prejudiced.

These provisions also hold good when the agreements are not put into a form binding in law.

Sec. 28. If the municipality, under sec. 13, is liable for compensation, or if an allotment falls to it under sec. 18, par. 3, and in these

cases its interest is in serious conflict with the common interests of the owners, then the district president shall appoint for the owners an attorney and administrator. The owners as a whole are to this extent to be regarded as legally capable of being made parties.

The attorney and administrator shall be considered a statutory attorney. He can be chosen from among the owners. On demand he shall receive, in addition to repayment of actual expenses, a reasonable remuneration for his services; the amount shall be fixed by the commission; payment shall be made by the municipality. The expenses, including those involved in legal proceedings (sec. 39), shall be advanced by the municipality to the attorney and administrator on demand.

The attorney and administrator shall receive a formal appointment to that position.

SEC. 29. Expenditures that the municipality is obliged to make in payment for the value of property coming to it cannot be included in any apportionment among the owners. This applies especially to the compensation to be paid under sec. 13, to the payment for which the municipality is liable in case of an allotment to it (sec. 18, par. 3), and to the damages to be paid by the municipality where the provisions of sec. 9, par. 1, of the Law with regard to the Expropriation of Land, of June 11, 1874, are applicable (sec. 21).[1]

The remaining expenditures for which the municipality, under secs. 24, 28, par. 2 and 36, par. 1, sentence 2, is liable (distributable expenditures) shall be divided among the owners in so far as the executive branch petitions therefor (replotting quota). On the other side of the account and to be deducted from the total of the expenditures that can be distributed are:

1. The contributions and recompenses (sec. 15, sec. 18, par. 3) to be paid to the municipality, and the other payments to be made it under sec. 36, par. 1, sentence 2.

2. The compensation to be paid by the municipality under sec. 13, as well as the recompense which it must make in case of an allotment to it (sec. 18, par. 3).

SEC. 30. The distribution of the distributable expenditures of the municipality (sec. 29, par. 2) is made in proportion to the gain accruing to each owner from the replotting or—in so far as the application of this standard of distribution does not appear to be possible or appropriate—in proportion to the frontage, the area and location or the value of the lot assigned.

On petition of the owners, the payment of the replotting contribu-

[1] The paragraph of the expropriation law referred to reads as follows: "When only a part of a lot is taken, the owner has the right to demand that the expropriator shall take and pay for the whole of it if the lot is so divided, that the remnant can no longer be suitably employed for its former use."

tion shall be postponed until the sale or the building up of the lot, on payment of interest at the rate of 3½%.

In so far as by reason of the distribution of the replotting contributions the value of the assignment under sec. 11 to 14, less the replotting contribution, would be smaller than the value of the lot thrown in, the owner shall not be taken into account in that distribution; and the rule shall be the same with regard to the owners to be compensated under sec. 16.

Sec. 31. In so far as the total amount of the payments mentioned in sec. 29, par. 2, nos. 1, 2 is in excess of the total amount of the replotting contributions that can be distributed, the owners shall receive recompense from the municipality therefor. The recompense shall be made in accordance with the provisions of sec. 30, par. 1.

Sec. 32. The petitions mentioned in sec. 15, sec. 18, par. 1, sec. 23, par. 3, sec. 29, par. 2, must be made at latest as objections to the plan of distribution (sec. 37).

Sec. 33. The parties concerned shall enforce their claims, as soon as they can be ascertained, if possible before the commission or the supervisory committee. If this is not done, then the commission or the supervisory committee may impose upon those concerned the cost arising from their belated enforcement.

4. Making and Establishing the Plan of Distribution

Sec. 34. In conformity with the provisions of secs. 10 to 31, 33, the commission shall make a plan of distribution with map annexed.

This plan and map shall show the old ownership and the new distribution. In this connection it shall show the individual lots with their size and their owners, the public ways to be discontinued and those to be changed in location, the approaches and ways to be constructed under sec. 23, the arrangements to be made under sec. 25, pars. 1, 2, and the compensation to be provided for under secs. 11 to 14, 16 to 24, as well as the payments to be required in accordance with secs. 15, 18, par. 3, secs. 29, 30, 33. It must also appear in what way under sec. 12, par. 2, sec. 17, par. 3, these requirements are met.

Sec. 35. The commission shall hold a hearing with regard to the plan of division and the map (sec. 34) for the benefit of those concerned.

To it the municipality, the owners, and those who have given notice of adhesion to the proceedings, shall be summoned by personal service; the notice to be present and make their claims shall be given to the others interested in the manner customary in the locality. The notices shall contain an abstract of the provisions of secs. 32, 33, and give notice that if they fail to appear, the decision on the plan of division, the fixing of any money payments, contributions, recompenses and distributable expenditures, the payment or deposit of the

fixed money recompenses and the necessary arrangements under sec. 25, will occur in their absence.

At the hearing everyone interested may appear and urge his interests. If necessary the hearing shall be adjourned to another time or place.

The local police authorities shall be given an opportunity in the proceeding to urge the interests of the local police. It shall be given special notice of the hearing and may send a representative to it. The provisions in the plan of division, so far as they are of local police interest, shall be determined, so far as possible, in agreement with the local police authority.

Sec. 36. The commission shall decide with regard to the plan of division with map annexed, especially with regard to the petitions of those interested for changes or additions, and when necessary shall correct and complete the plan of division and map in accordance with these decisions. At the same time the results of agreements which the parties have reached with regard to the founding, release, maintenance or change of real rights shall be made a part of the plan, in so far as they are not in conflict with the purpose of the replotting proceeding.

In the decision, in addition to the chairman, at least one of the expert members provided for in sec. 8, par. 2, must take part.

Sec. 37. After the decision has been rendered, the commission shall place the plan of division with map annexed on public exhibition and, at a time appointed therefor, shall show the owners the lots assigned them on the spot. The provision of sec. 4, sentence 5 shall apply in this connection, with the modification that, in the notice of the opportunity to inspect, the chairman of the commission shall be designated to receive objections to the plan of division. In addition, a copy of the plan of division with map annexed shall be sent the municipality and the owners, and notice of the opportunity to inspect shall be given to the other parties with regard to whom a decision has been made in the plan of division, or who have joined in the proceeding.

The time within which objections may be raised begins to run against the parties mentioned in the foregoing paragraph upon service, against the others upon the public exhibition of the plan of division.

If the discontinuance of public ways is under consideration, then the road police authority shall be notified. Objections to the discontinuance shall be disposed of as a part of the replotting proceeding.

Sec. 38. If objections are raised to the plan of division, then the commission shall endeavour to dispose of them by negotiation. If they are not successful in disposing of them, then the papers and negotiations, with a report in detail, shall be laid before the district committee. It shall give a final decision with regard to the objections.

If objections are not raised, or when they have been decided, then the establishment of the plan of division shall take place through final decision of the district committee.

To the executive branch the owners and the attorney and administrator (sec. 28), a copy of the established plan of division, with map annexed, shall be sent, to the other parties with regard to whom a decision has been rendered therein or who have taken part in the proceeding, a notice of the establishment of the plan of division shall be given.

The executive branch shall make public the establishment which has occurred, in the manner usual in the locality.

5. *Legal Remedies*

Sec. 39. In so far as the demands for compensation in money under secs. 11, 13, 14, 16-23 are concerned, the parties in interest may bring legal proceedings in opposition to the plan of division from and after the time of its establishment. The complaint may be instituted at any time within two months after the day of replotting (sec. 40, par. 1).

As against parties to whom a notice of transfer shall be given (sec. 40, pars. 1, 4) this period ends in any case not earlier than two months after service of notice.

If under sec. 13 an attorney and administrator is appointed (sec. 28), his complaint shall be brought against the municipality, and that of the municipality against him; in the other cases it is to be brought by the owners and the parties named in sec. 57, par. 2, nos. 1, 2, against the municipality and by it against said parties.

Under sec. 15 the above provisions apply, except that action can be brought only by the owners whose land is burdened.

6. *Carrying out the Plan of Division*

Sec. 40. The carrying out of the plan of division shall not be stayed by legal proceedings. It is effected by a declaration of transfer to be issued by the district committee by final decree. In it the day on which the legal changes with regard to lots to be replotted shall take place, shall be stated (the day of the replotting).

The day of the replotting is to be so fixed that between the day of notice of the declaration of transfer and the day of the replotting, an interval of at least one month shall occur.

The declaration of transfer shall not be made until it appears that the compensation fixed in the plan of distribution under secs. 14, 16-23, 31, has been paid or deposited. This declaration may be made at the same time as the establishment of the plan of division (sec. 38, pars. 2, 3) and made a part of it.

In addition to the executive branch, the owners and the attorney and administrator (sec. 28), the other parties with relation to whom a decree has been passed in the plan of distribution or who have taken part in the proceeding shall receive notice of the declaration of transfer. The executive branch shall without delay make the declaration of transfer known in the manner usual in the locality.

Sec. 41. Upon the making public of the declaration of transfer the municipality obtains the right to lay out any temporary approaches and ways (sec. 23, par. 2) to be constructed in accordance with the plan of division.

Sec. 42. When the declaration of transfer is made public in the usual manner, then, on the day of the replotting, the provisions of the plan of division become effective. The former rights of ownership in the lots thrown into the mass are extinguished. At the same time the lots thus thrown in are freed from all private land encumbrances and limitations; especially trusts, entails, feudal obligations and liens for money lent.

The municipality or other authority obliged to maintain ways becomes owner of the land assigned to public streets and squares under sec. 10, par. 2. In so far as land is assigned for land thrown in under sec. 12, the lot assigned, so far as ownership and other private right relationships mentioned in par. 1, sentence 3 are concerned, takes the place of the lot thrown in. From such transfers to the lot assigned are excluded, however, in so far as not otherwise provided in the plan of division, building leases,[8] servitudes, the right of repurchase and of preferential purchase and the real encumbrances not consisting solely of the obligation to pay money or render the fruits of the soil or personal services.

The money compensation fixed in accordance with the provisions of secs. 14, 16, 18, pars. 1, 2, secs. 23, 31, 39 takes the place of the lot thrown in, in so far as the legal relations mentioned in the previous paragraphs are concerned. The same is true when under secs. 14, 16, 18, pars. 1, 2, secs. 23, 31, the fixation occurs by reason of an agreement.

The relationship of landlord and tenant and leasehold relationship, by reason of which the tenant or lessee holds the lot thrown in, are extinguished, except in so far as the holding remains undiminished and the plan of division does not otherwise provide.

Sec. 43. On request of the commission the land book office shall enter in the land book the legal changes that take place, in accordance with the provisions of the plan of division and of this law, with relation to the rights entered in the land book or secured by entry, and shall cancel the entry of pendency of replotting; and shall also enter in the land book that the lot, in accordance with the provisions

[8] *Erbbaurecht.*

of sec. 15, par. 2, or sec. 18, par. 3, is liable for a contribution or recompense, and, in accordance with the provisions of secs. 29, 45, is liable for a quota. With the request are to be submitted the before mentioned abstracts from the land registry book.

The request is to be made without delay and shall indicate accurately the entry to be made.

In so far as the land book is not to be considered as yet established for lots of land, the previous provisions shall be applicable with respect to the other legal books.

Sec. 44. The provisions of secs. 37, 38, 47-49 of the Law with relation to Condemnation of Land, of June 11, 1874, and arts. 35-41 of the Law carrying out the Imperial Law with regard to Compulsory Sales at Auction and Compulsory Administration, of September 23, 1899 (G. S., p. 291), applies with regard to the deposit and care of indemnities in money in case lots are subject to trusts or entails or leases or are burdened with real obligations, mortgages, ground debts or claims for rent.

7. Supplemental Plan of Division

Sec. 45. If the expenses of the municipality (sec. 29, par. 2) are increased by reason of the result of the rise of legal controversies, then the commission, on the petition of the municipality, shall by supplemental action impose upon the owners each his proportionate share of such additional amount.

The petition shall be made within one month of the final judgment of the last pending legal controversy.

If the expenses are lessened for the reason stated in par. 1, sentence 1, then the saving is to be credited to the owners on their contributions, or to be repaid them. If an agreement in this matter is not reached, then the executive branch shall petition the commission to prepare a supplemental plan of division. The petition may also be made by an owner.

The expenditures arising under sec. 23, par. 2, in so far as they are not already divided under secs. 29, 30, 34, ff., may be taken into account in the supplemental plan of division.

The provisions of secs. 16, 29, 30, 34-38, shall apply to the supplemental plan of division.

Sec. 46. In so far as the assignments under secs. 11 ff., less the replotting contributions (sec. 45), would no longer equal the value of the lot thrown in, according to sec. 16, pars. 1, 2, the owner may bring legal proceedings against the municipality for the cancellation of the replotting contribution or the repayment of the amount paid. The complaint may be brought within three months of the day on which the replotting contribution is finally fixed. The replotting contributions which cannot be recovered under par. 1, can be dis-

tributed by a supplemental plan of subdivision. The provisions of sec. 45, pars. 1, 5 apply.

8. Service

Sec. 47. The provisions of the General Administrative Law of July 30, 1883, with regard to the service of notices by the supervisory committee (G. S., p. 195 ff.) and the regulations rendered for the carrying out of the above laws, shall apply to service by the commission.

9. Particular Provisions

Sec. 48. The payments to be made to the municipality under the plan of division may be collected by it by coercive administrative proceedings. The contributions (sec. 15), recompenses (sec. 18, par. 3) and replotting contributions (secs. 29, 30, 45, sec. 46, par. 2) shall be deemed to be ordinary encumbrances.

Sec. 49. If the obligations to make contributions, recompenses and obligatory contributions are extinguished, then the executive branch shall apply to the land book office or the lower court for cancellation of the record of the pendency of the same.

THIRD PART

FINAL PROVISIONS

Sec. 50. If the agreements provided for in sec. 27 are entered into in a legally valid form and if the supervisory committee is of opinion in the case mentioned in sec. 27, par. 2 that the conditions mentioned in the second sentence of said paragraph 2 have been fulfilled, then the committee shall by decree end the proceedings, in so far as the executive branch and a majority of the owners reckoned in accordance with the provisions of sec. 3, par. 1, no. 2 petition for such ending.

Sec. 51. The supervisory committee may also stop the proceedings by decree on petition of the executive branch when on account of the position of affairs, especially in the light of claims for compensation advanced or of the danger of the raising of such claims, there is the fear that the carrying out of the replotting proceeding will be uneconomic or involve an unreasonable burden for the municipality, or when the carrying out of the proceeding for other reasons than those provided for in sec. 50 appears to be needless. Before such a decision is made an opportunity shall be given to the other parties in so far as they have taken part in the proceeding, to be heard with regard to the petition. Such a petition must be brought before the issuance of the decree of establishment (sec. 38, par. 2).

In the case provided for in sec. 3, par. 1, no. 1, the municipality shall repay the owners the necessary disbursements they have incurred.

SEC. 52. If the proceeding is discontinued under secs. 50, 51, then on request of the commission the land book office or the lower court shall cancel the notice of pendency of the replotting.

SEC. 53. After the building police authority has been notified of the intended replotting (sec. 4), the permit for the erection of buildings on lots for the replotting of which a petition has been filed shall not be issued without previously hearing the executive branch with relation thereto. The building police authority may refuse the permit, or issue it conditionally if by the erection of the building the replotting would be made more difficult.

No compensation will be allowed for such limitation of the freedom to build.

SEC. 54. The costs of the proceeding, without prejudice to the provisions of secs. 5, 6, 33, shall be borne by the municipality.

With regard to the costs, dues, and stamps, in so far as in this law it is not otherwise provided, the provisions of sec. 43 of the Law with regard to the Condemnation of Ownership in Land, of June 11, 1874, shall also apply.

SEC. 55. In so far as expenditures of the municipality which cannot be distributed (sec. 29, par. 1) or which although distributable (sec. 29, par. 2, sec. 45, sec. 46, par. 2) cannot be distributed on account of the lack of a legal prerequisite, or the costs of the procedure (sec. 54, par. 1) which fall to the municipality, are concerned, they cannot be shifted or specially imposed in whole or in part on the owners of the replotting district, whether by imposing liabilities or requiring contributions.

SEC. 56. The periods named in this law for the performance of the acts named, are the full periods allowed therefor.

SEC. 57. Parties within the meaning of secs. 4-6, are,—in addition to the municipality,—the owners, the mortgagees, and ground rent creditors and those parties who are entitled to usufruct or an inheritable building right in the lot to be replotted.

As parties within the meaning of secs. 11, ff., are reckoned in addition to the municipality, the owners and the attorney and administrator (sec. 28) the following:

1. Those in whose favor a right has been entered in the land book or any other legal book, or a right is secured by such entry.

2. Those who have any other right in a lot to be replotted, or in a claim which is a lien on the lot, the tenant or lessee who has been given possession of the lot by reason of the lease, and, in case of compulsory sale at auction or receivership, the creditor bringing action.

The rights of the person having the right of possession are the same under this statute as the rights of the owner.

Parties whose right is not entered in the land book or any other legal book must, on the demand of the municipality, an owner, the commission or other authority before whom the proceeding is pending, establish their right; prior to such establishment such parties may be excluded from participation in the proceeding.

If a lawsuit is pending with regard to a right upon which a claim to participation in the proceeding could be based, then both parties to the suit shall be deemed parties to the proceeding.

SEC. 58. This statute goes into effect January 1, 1903.

The Minister of Public Works and of the Interior shall see to the enforcement of the law.

Dated July 28, 1902.

REPLOTTING AGREEMENT UNDER LEX ADICKES

Replotting and Division agreement by and between the municipality of Frankfort-on-the-Main, represented by the City Treasury, party of the first part, and [here follow the names of the land owners] parties of the second part, subject to the ratification of the Superior City authorities, as well as (by way of supervision), of that of the supervisory committee at Wiesbaden, as follows:

SEC. 1. The above mentioned parties hereby unite into a single common tract their lots of land between the Nordring, the Eschersheimer Landstrasse, the Klettenbergstrasse, the Cronstetten Strasse and the Eckenheimer Landstrasse, described in a certain proposed plan of replotting, drawn up by the survey office of the Department of Streets and Sewers and dated December 18, 1908, and numbered ——— and hereby grant each to the other the right of ownership to an undivided share in the common tract created proportionate to the area of the lot thrown in . . .

The contracting parties hereby apply to the Royal Registry Office or the Survey Office of the Department of Streets and Sewers for the registration of the new common tract, and the calculation of the size of the undivided shares therein.

The contracting parties hereby agree that the value of the individual undivided shares in the new common tract equals the value of the individual lots in question thrown in.

SEC. 2. All the parties to this contract, as joint owners of the tract of land held in common created under sec. 1, hereby so partition said common property that to each shall be assigned in severalty the portion of the newly created lots described in said proposed plan of replotting as follows:

[Here follows a description of the several lots.]

SEC. 3. The parties to this contract agree that the value of the lot of land or portion assigned to each of them under sec. 2 is equal to the value of his undivided share in the combined tract of land

thrown in for replotting; so that, except under the provisions of sec. 6, no payment shall be made by any party.

All the parties declare themselves satisfied with the proposed plan of replotting, and map annexed, the division and assignment of lots of land in return for the lots thrown in, as well as the percentage of land necessary to be surrendered for the proposed streets within the replotting district, and bind themselves accordingly at any time at once to make or receive the necessary cessions, to effect the necessary conveyances, cancellations, releases, new hypothecations, etc., at once to place at the disposal of the municipality of Frankfort-on-the-Main, cleared for the laying out and construction of streets, as well as, in accordance with the statute of July 2, 1875, or local statute,[9] to surrender, without charge and free from encumbrance, the portions of their holdings falling within the lines of said streets, to cause all the registrations and surveys necessary for these purposes to be made, to execute the necessary authentications and make the necessary dispositions and to bear the resulting stamp and other costs—excepting the costs of survey—in proportion to their land areas thrown into the replotting, in so far as the parties do not enjoy freedom from stamps and duties.

Sec. 4. The contracting parties bind themselves to convey to the new owners the lots assigned to them in accordance with sec. 2, free from mortgage encumbrances, liens, or other burdens. . . .[10]

Sec. 5. The construction of the streets within the replotting district, as well as the permission to build on land abutting on these streets, is subject to the conclusion of a separate agreement with the Department of Streets and Sewers, which shall be concluded at latest October 1, 1910.[11]

Sec. 6. The contracting parties agree that the city of Frankfort-on-the-Main, in return for the extra expense incurred or to be incurred by it for the purchase of the realty known as No. 179 Eckenheimer Landstrasse and No. 7 Kuhhornshofstrasse, needed for laying out streets, shall at once be assigned a net area of 26 ares, .06 square meters.

Sec. 7. *Restrictions on Use of Land and Buildings thereon.* In order that the replotting district may have and retain the char-

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[9] The statute of July 2, 1875, is the Prussian City Planning Statute. A translation of this statute will be found on p. 466 ff. of this work. That statute provides for the surrender of land by the owners, under certain conditions, for new streets, and for the passing of local statutes varying these provisions in certain respects, if the city so desires.

[10] In some contracts the city agrees to execute at its own cost certain clearance and construction work of peculiar character and unusual expense.

[11] Often the replotting contract is made subject to the execution of a given contract for street construction, a copy of which is, in such cases, annexed.

acter, in part of a district of detached houses, in part of a better class residential district, the following agreements are made by and between the parties to this contract:—

I

(1) For building in the replotting district, in addition to the building police regulations at any time in force, the following special rules shall be made and established by entry of a servitude:

[Here follow provisions for the approval of plans by the building commissioner,[13] the exclusion of business except at certain places, and the minimum number of rooms in houses on certain streets.] [12]

II

For the regulation of building in [a specified part of the replotting district] in addition to the rules to be introduced, as provided in I, above, by the entry of a servitude, there shall be building police regulations substantially to the following effect, issued by the building police by ordinances as an addition or amendment to the Building Police Ordinances with Regard to Building in the Outer City:—

[Here follow provisions with regard to the height of houses, the permitted number of apartments in them, rear building lines, distance between houses, and the care of front lawns.]

The restrictions in building on and use of land, provided for in I, above, shall be considered as a limited personal servitude in favor of the municipality and as an encumbrance on the land in question, as provided for in secs. 1090 and 1092 of the Civil Code [14] and shall be entered in the land book.[15] Sec. 1091 of the Civil Code shall not

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[13] In some contracts a mixed commission, appointed by the city and the property owners, passes on plans.

[12] In some contracts there is a provision that: "The above restrictions on building on and use of land shall remain in force, any change or abrogation, total or partial, in the contemplated building ordinance for the districts in question notwithstanding."

[14] It is the code of the entire Empire, in force January 1, 1910, which is referred to.

[15] In another contract with other parties and with relation to other land, the city agreed that: "In so far as the city is the owner of lots of land in the replotting district, it is understood that such land is subject to all the provisions of Part I, to the same extent as land of other owners: and the city hereby expressly agrees for itself to observe, in so far as the lots of land owned by it are concerned, the building and use restrictions stated in said Part I.

"In so far as the city of Frankfort sells lots of land in the replotting district it agrees to see to it that, when such sales are made, the said building and use restrictions of Part I are, as provided in Part I, recorded as a lien on these lands, and, in favor of the municipality, made a limited personal servitude, and so recorded against the purchaser in the land book.

"These provisions, however, shall not apply to buildings erected for

apply.[16] The land owners hereby bind themselves to cause the above mentioned servitude to be entered in the land book, prior to all mortgages and other encumbrances, and the undersigned consent and agree to the entry of such real servitude.

The municipality of Frankfort-on-the-Main will agree, on the demand of the mortgagees of a first mortgage to be placed, to give it priority over said servitude to the extent that the mortgage lien does not exceed 60% of the value of the realty in question. For the valuation the appraisal of the City Treasury together with that of the Department of Buildings or the Building Police shall alone control.[17]

III

All the parties to this contract agree that by virtue of the contract, throughout the replotting district, all such provisions as are now in force with regard to the space between buildings by virtue of private law, especially the provisions of the Frankfort law of April 1, 1851 with regard to such space, fencing, and ways of necessity, shall be regarded as revoked, and in their place the agreements of this contract and, in so far as there are none such, provisions of the building police ordinance existing at any time, shall alone be in force.

Sec. 8. With the exception of the cost of surveys, which remain wholly the obligation of the municipality of Frankfort-on-the-Main, all the costs arising out of the making and execution of this contract, including the cost of conveyance as well as that of the stamp dues,

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monumental and public purposes and which belong to the city or other public corporations (e.g., churches, schools and the like) so long as these buildings remain the property of these corporations, or devoted to such public purposes, or retain their monumental character. As soon as any of these prerequisites cease to exist, the provisions of the two previous paragraphs apply to the lot in question with full force and vigor.

"The city will, so far as possible, see to it that the purpose sought to be attained by said sec. (7) shall not be jeopardised by the method of building on or use of the neighboring districts. This provision applies especially to [here follows a description of certain neighboring districts], for which, when they are opened for building, regulations similar to those stated above (pars. I, II, III) shall be established."

[16] Sec. 1091 of the Imperial Code provides that the presumption in cases of doubt shall be in favor of the person entitled to the servitude.

In some cases there are provisions by which property owners give certain city officials power of attorney to carry out and complete the contract by designating, describing and bounding lots of land, executing and recording further conveyances, etc.

[17] A provision not inserted in the usual contract. It illustrates the possibility of varying the form here given to suit special circumstances.

shall be borne by the parties to this contract in the proportions of the lots thrown into the replotting by them to each other (comp. sec. 1).

[Here follow provisions exempting the contracting parties from transfer and other taxes, etc.]

SEC. 9. The above contract shall be in force upon the conclusion of the contract with regard to the construction of streets within the replotting district and permission to build on land abutting on them, mentioned in sec. 5.

Dated, etc.

CHAPTER III

EXCESS AND ZONE CONDEMNATION AND REPLOTTING IN THE UNITED STATES [1]

Revival of Excess Condemnation in the United States.—Excess condemnation, practiced with success under the New York statute passed in 1812, virtually ceased to be employed in this country after that statute was held to be unconstitutional in 1834 and did not again appear until revived in Ohio and Massachusetts seventy years later.[2]

In 1903 the Massachusetts legislature appointed a committee to study foreign law and practice on this subject. Late in that year the committee made a report [3] recommending the passage of a law authorizing the condemnation of remnants and of enough neighboring land to form, by union with them, suitable building lots for sale and private development. The legislature at that time, however, was unwilling to pass so broad a statute, and enacted a law [4] merely allowing the condemnation of the remnant itself when too small for independent development, and its elimination by resale to the owners of adjacent property, if they chose to purchase it. This statute proved to be of little or no value, and a later legislature, in its

[1] For reference to the various constitutional and statutory provisions relating to excess condemnation, see Tables of Statutes. The text of the most important constitutional and statutory provisions is given in note B., p. 148 ff.

[2] See p. 70. A Pennsylvania Statute was passed April 14, 1868 (P. L. 1087, sec. 13), authorizing the Fairmount Park Commission of Philadelphia to condemn and sell remnants; but the only case where this was done seems to have been one occurring a few years ago; see Cushman, *Excess Condemnation* (1917), p. 61. A New Jersey Statute (1870, ch. 117) which authorized Newark to replot a small portion of its area, should also be noted in this connection. It is reprinted on p. 149.

[3] Mass. *House Documents*, 1904, Nos. 288, 1096. See also final report of the Joint Board on Metropolitan Improvements, 1911.

[4] 1904, ch. 443.

desire to authorize the taking by eminent domain of the neighboring land, as the committee of 1903 had suggested, asked the opinion of the Judges of the Supreme Court of the state as to the validity of such a law, and received the reply [5] that in their judgment the existing statute of 1904 was legal, but that the proposed measure would be unconstitutional. Whereupon, in 1911, the legislature amended the state constitution to permit the passage of such a law.[6] A number of statutes and amendments of state constitutions authorizing excess condemnation for the purpose of eliminating remnants have been passed in this country since the enactment of the Massachusetts statute of 1904, all of which permit the condemnation of neighboring land to that end. The only other measure in this country for this purpose which does not allow adjacent land to be so taken is the New York statute of 1812, which, however, is broader than the Massachusetts statute of 1904 in that it does not place any limit on the size of the remnant that may be condemned.

Purposes of Taking.—The Ohio statute, passed in 1904,[7] a few weeks before the enactment of the Massachusetts law,[8] was the result of a suggestion of the commission that recommended the creation of a civic center for Cleveland, but was passed as an amendment to Ohio's well known municipal code of 1902 and applies to all the cities of the state. The Ohio provision authorizes Ohio cities to condemn excess land to protect certain classes of improvements and preserve their "view, appearance, light, air and usefulness."

A purpose expressed in the statute of one state [9] is the proper plotting of the excess land in connection with the main improvement. The statutes of one state [10] authorize condemnation, and excess condemnation, as an aid in the construction of houses to relieve congestion. Very evidently the purposes of these various statutes are not in all cases mutually exclusive.

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[5] Opinions of Justices, 204 Mass. 607, 616 (1910).
[6] Mass. Constitution, Art. X, Part. 1, as added to by Art. XXXIX of amendments.
[7] Now General Code of Ohio, 1910, sec. 3677, par. 12
[8] The Ohio Statute was approved by the Governor April 25; the Massachusetts Statute, June 8.
[9] Virginia; and, less clearly, in several other states.
[10] Wisconsin.

None of the statutes or constitutional amendments in this country expressly authorize condemnation for the sake of making a profit. All of them, however, provide that the excess property may be sold. Evidently, therefore, the transaction may result in a profit. In some cases it is provided that the sale may be "with," in some cases "with or without" proper restrictions to secure the accomplishment of the aim of the law; in others there is no provision for the imposition of restrictions. It may be asked whether the result of a taking under a statute in which there is no provision for restrictions on the sale can be to the advantage of a city or other public body in any other way except financially. To this question there are two answers. The right of a city, with the authority of the legislature, to dispose of an absolute or partial interest in any real estate of which it has rightfully obtained the title would seem to be clear, and even if the title were not limited when transferred, the city, by combining remnants with the adjoining land, or otherwise replotting it, achieves a result which is for the public benefit and which, when once obtained, will in all probability endure without any legal restrictions to safeguard it. The provisions for imposing restrictions on land resold would not seem, therefore, essential to the validity of an excess condemnation statute.

Excess condemnation provisions differ in other respects besides that of expressed purpose. Thus under the Ohio statute [11] the improvement in connection with which the power may be employed is limited to the establishment of park and other spaces around public buildings, while under other provisions it may be exercised in aid of parks of all sorts; [12] including playgrounds; [13] streets and squares; [14] sites for public buildings; [15] or any public work.[16] In the Ohio statute and some others the power is given to municipalities, while under other enactments

[11] See Tables of Statutes.
[12] Pennsylvania, Massachusetts (1904), and others.
[13] Wisconsin (Constitution), Oregon and others.
[14] In most of the provisions.
[15] Connecticut, Wisconsin (Constitution); see also Maryland.
[16] Ohio (Constitution), Virginia.

it is either extended also to towns,[17] and the state,[18] or limited to certain cities or classes of cities; in the Ohio statute and some others it is provided that any land needed for the purposes for which the power may be exercised can be taken, while in some other provisions land only within two hundred [19] or three hundred feet of the main improvement,[20] or land sufficient to form suitable building lots,[21] or sites,[22] can be so condemned.

Constitutional Amendments.—From the first there was a general fear that a statutory power of condemnation would be held by the courts to be a taking of property for a use that was not public and therefore that the statutes would be held to be invalid as contrary to the constitutions of the various states and of the United States. The advocates of excess condemnation observed that as a rule the state constitutions were more strictly construed than the Constitution of the United States.[23] They therefore advocated and secured amendments of excess condemnation to the constitutions of several states, the first amendment being that of the constitution of Massachusetts in 1911 already referred to. Two of these amendments—those in Ohio and Wisconsin—are self executing; under the Massachusetts amendment the executory act in each case specifies the lands to be taken in excess; and in other states which have amendments of excess condemnation—New York and Rhode Island—the legislature may pass general laws authorizing such condemnation. A number of laws have been passed under the amendments of the constitutions of Massachusetts, New York and Rhode Island.

Owners' Right of Repurchase.—There is a feeling on the part of some that the owner of the land condemned in excess should be given the first right to repurchase it, and

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[17] Massachusetts (Constitution), Rhode Island and others.
[18] Wisconsin (Constitution), Virginia, and others.
[19] Pennsylvania, Oregon.
[20] Wisconsin.
[21] Massachusetts (Constitution).
[22] New York and Rhode Island (Constitutions).
[23] See p. 22.

evidently the hostility of the Pennsylvania court to the statute of that state was partly due to the absence of such a provision. Many foreign laws give the former owner this right,[24] but the only provisions in this country of this sort are those of Massachusetts and Rhode Island.

Taking on Security of Excess Lands.—In Ohio the constitutional amendment provides that a bonded indebtedness in payment for the land taken may be created, but that it shall be a claim only against the property acquired for the improvement and the excess, and not against the municipality or included in the debt limit. This is the use of a well known device, more fully discussed elsewhere,[25] to avoid the effect of debt limits which often unduly hamper municipal growth. There is, however, an important difference between an improvement of the sort for which excess condemnation is useful, and such transactions as the construction or acquisition of public utilities, to which provisions such as this usually apply. Sound practice requires that the utility should be self-supporting, and therefore an adequate security for the indebtedness incurred, while this is by no means necessarily true of many improvements, such as thoroughfares and parks, in connection with which, nevertheless, excess condemnation would often be most useful.

Constitutionality of Excess Condemnation.—The question of the constitutionality of excess condemnation in this country is the question whether or not such condemnation can fairly be said, on principle and on the authority of the legal decisions on the subject, to be for a public use. Nowhere in the constitutions is such a criterion expressly set up. They merely provide that property shall be taken for a public use only on payment of just compensation, or by due process of law. The prohibition of any taking for a private use is deduced from these provisions, and is sustained by all the cases on the subject.

The expressed purposes for which excess condemnation is authorized in this country—the elimination of remnants, the

[24] See also p. 67, note 10.
[25] See p. 362.

plotting of the land adjacent to the main improvement, the protection of its light and air, the enhancement of its attractiveness—are all purposes which, whatever may have been the case a few decades ago, are now generally recognized by the courts and the public to be in the public interest. The decisions directly upon excess condemnation, however, are generally adverse. These decisions, few in number and all in state courts, do not, in the main, take up the aspects of the provisions in which they differ, but consider the general theory underlying them all. They may be divided into the older decisions rendered between 1824 and 1863, interpreting the statutes first passed in this country on this subject, and the modern decisions made after excess condemnation had been reintroduced here in 1904.

The earlier cases consist of a decision in South Carolina,[26] and a case, with the cases in accord with it, in New York. The South Carolina case, decided in 1824, interprets a little known South Carolina statute which became a law in 1817;[27] the New York case [28] passes on the well known statute of that state, enacted in 1812.[29] The purpose stated in both these statutes is the elimination of remnants.

In the opinion of the judges in these earlier cases all excess condemnation is unconstitutional as a compulsory taking of private property for a use which is not public. The authority of these cases, however, is weakened by the fact that in each case they hold that the statute which they are interpreting authorizes only an excess taking with the consent of the property owner; which is not condemnation but purchase. The statements with regard to excess condemnation are therefore dicta not necessary to the decision of the case, of little force in subsequent cases. If the taking is really in excess, it would seem that the municipality, existing as it does for the benefit of

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[26] Dunn v. City Council of Charleston, 16 South Carolina Law Reports (sometimes cited as Harper's Law Reports), p. 189.

[27] 7 Statutes, 136.

[28] In matter of Albany Street, 11 Wendell (N. Y.) 149 (1834); see also Embury v. Conner, 3 N. Y. 511 (1850), Bennett v. Boyle, 40 Barbour (N. Y.) 551 (1863).

[29] Laws of New York, 1812, ch. 174.

its public, could not acquire it even by purchase; but the courts, whose real objection to excess condemnation seems to have been the supposed injustice, or in any event hardship, to the owner of excess condemnation, have uniformly supported excess acquisition to which he has consented, although in both cases he receives full compensation; nor have they thought it necessary to inquire whether an excess purchase was for the benefit of the municipality at whose expense it was made.[30]

Nowhere in the earlier cases with regard to excess condemnation, either in the arguments of counsel or in the opinion of the judges, is there shown any knowledge or appreciation of the advantages of excess condemnation to the community. Thus the South Carolina judges state the issue to be "Whether the Legislature has the constitutional right of taking the property of one individual, and transferring it to another, or to a body corporate, for their own individual benefit and emolument;" [31] and in one of the New York cases it is said that "it needs no argument to show that the end and design of this section was not to take private property for the use of the public." [32] Naturally the judges decided that such an invasion of property rights was unwarranted.

The Modern Court Authorities on Constitutionality. —The modern decisions on excess condemnation consist of two opinions of the Justices of the Supreme Court of Massachu-

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[30] Embury v. Conner, just cited; Durgan v. Boston, 12 Allen (Mass.) 223 (1866). It must also be remembered that, although it might be within the power of a taxpayer if he learned of the project seasonably, to raise the objection that public money would be spent for an unauthorized purpose, only the state can challenge the completed transaction (MacQuillan, *Municipal Corporations,* Vol. IV, p. 2487), and it is usually the owner of property unwilling to part with it who raises objections of this sort. This is a logical distinction, not without possible merit. Cities should not be permitted to obtain land or do any act except for the general good; but legislatures may well regard the bestowal of a power of voluntary purchase as expedient for objects for which they would hesitate to grant the much more drastic power of compulsory acquisition.

[31] Dunn v. Charleston, 16 South Carolina (sometimes cited as Harper's) Law Reports, p. 189 at p. 199 (1824).

[32] Embury v. Conner, 3 N. Y. 511 at p. 516 (1850).

setts, already referred to,[33] and a case in Pennsylvania.[34] Except for the support by the Massachusetts judges of the condemnation of remnants too small for independent development, as a minor incident in a main improvement—the extent to which there is judicial approval for excess condemnation in this country—these authorities hold excess condemnation to be unconstitutional, as a taking of property for a private use. It should be noted, however, that the utterances of the Massachusetts judges are not, and are not fully entitled to the weight of, judicial decisions; for, as the judges themselves say:—[35] "in giving such opinions, the justices do not act as a court, but as constitutional advisers of the other departments of the government." As a court it is their duty to decide matters actually at issue. They give advice only in accordance with a special provision of the constitution requiring it.[36] A mere statute imposing such a duty is invalid as an attempt to force the judiciary, a coördinate branch of the government, to perform duties that are not judicial in their nature.[37] As a rule also the judges are more conservative in rendering opinions than in deciding cases in which actual issues are at stake, investigated and presented by lawyers.

Implicit in the earlier cases is the theory that a public use is necessarily a use by the public; and that, therefore, a taking for use by a private person or corporation, however much for the public advantage, cannot be sustained in this country. It is on this theory explicitly stated that the modern cases hold excess condemnation to be unconstitutional. In support of this doctrine they rely upon the Massachusetts case of Lowell v. Boston [38] and the many authorities in various jurisdictions in accord with it. This case decided that a statute authorizing

[33] Opinion of Justices, 204 Mass. 607; ib. p. 616 (1910).
[34] Penn. Mutual Life Ins. Co. v. Philadelphia, 242 Penn. St., Reports, 47 (1913); see also Bond v. Mayor and City of Baltimore, 116 Md. 683 (1911).
[35] Opinion of Justices, 126 Mass. 557 at p. 566 (1878); in acc. 95 Maine 564 (1901).
[36] Mass. Const., ch. III, art. II.
[37] Application of Senate, 10 Minn. 78 (1865).
[38] 111 Mass. 454 (1873).

the city of Boston to borrow money to lend to citizens for the purpose of reconstructing buildings which had been destroyed in the great fire of 1872, was invalid. The Massachusetts justices say in this case:—

> "The lending of such money presumably would have promoted building and the transaction of business in the devastated district, but the benefit to the public would not have been direct, but only incidental."

and they quote with approval the statement in that case that

> "It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefitted by their promotion."

This is also the theory of the Pennsylvania case and these are the authorities upon which it is based.

Effect of Recent Decisions of Supreme Court of United States.—The position taken by the Massachusetts justices and the Pennsylvania court is much weakened by recent decisions of the Supreme Court of the United States upholding state statutes for the condemnation of land for a private use, such as irrigation or mining on private land,[39] on the ground that the private advantage may be so conducive to public prosperity and well-being as to be a public use for which resort may be had to the power of eminent domain. This holding has much to be said in its favor, and in comparison the doctrine announced by the Massachusetts and Pennsylvania judges seems highly technical. The commonwealth is composed of private people, and it is still the theory of our law that the wealth and property of the state should be in their hands for development, with such aids and limitations as the commonwealth may impose. It would seem clear to the layman that it would often be extremely desirable to pass regulative measures aiding these private citizens in this development, and that it might in some cases be done in such a way as, far from injuring the other

[39] Strickley v. Highland Boy Mining Co., 200 U. S. 527 (1906); Clark v. Nash, 198 U. S. 361 (1905).

members of the community, would be of benefit to them; leaving the question as to whether the particular use was sufficiently widespread and of sufficient general importance to be regarded in law as public, to be settled on its merits in each specific case.

Even, however, if the narrower and older conception of a public use be adhered to, it does not follow that excess condemnation is unconstitutional. Most of the statutes authorize the taking of an interest in the excess land, which is retained in public use and ownership. Thus under the statute held invalid by the Pennsylvania court Philadelphia attempted to take excess land to preserve view, appearance, light, air, etc., for the public in its use of a public park way. It is true that a part interest in this excess land was to be subsequently sold—the interest which would have been of no advantage to the public; but it is just as true that an easement—a part interest recognized universally as valid in our law—was to be retained in perpetuity. It is now recognized that an easement to secure light, air and view, and to improve the appearance of a public work, may be taken by eminent domain.[40] The legislature in this statute of excess condemnation authorized the taking of the entire title as an expedient method of obtaining such an easement; and it is established law that the legislature is the judge of the extent of the interest necessary to be acquired and, in general, of the means to be employed in the accomplishment of a lawful object.[41]

There are a few statutes of excess condemnation—those whose purpose it is to secure the elimination of remnants or the replotting of excess land—which do not contemplate, in so doing, the permanent retention by the public of any interest in this land. But to the full accomplishment of these ends no such permanent interest is necessary. Laws authorizing the taking of land for a limited period of time for the purpose of doing some public work, and its resale after that work is accomplished, are common in this country, and have repeatedly been sustained by our courts. The proper plotting of land would

[40] Atty. Gen. v. Williams, 174 Mass. 476 (1899); see also p. 173.
[41] See p. 21.

clearly seem to be such a purpose; and with the progress of city planning in this country there is good reason to hope that it will be recognized.[42] It should also be noted that temporary use is nevertheless use, and that these uses are, in excess condemnation for replotting, uses by the public within the narrow definition of that expression.

Taking for Profit.—It has already been pointed out that none of the provisions for excess condemnation in this country authorize its use for the purpose of obtaining financial profit, although obviously profit or loss may be one of the results. It is well settled in this country that a municipality cannot undertake an enterprise merely for the sake of the resulting profit. If, therefore, the enterprise in question be regarded as the taking of the additional land, and the purpose of the taking be the profit, the enterprise, so defined, is unwarranted. This is the way in which the Massachusetts judges, in their opinion already cited, regarded the matter.[43] But, it is submitted, the enterprise is not the taking of the additional land; that is merely a more or less important incident in the main enterprise of constructing the street, civic center, or other improvement. Any business man would regard the making of money in connection with a transaction in order to pay for it as a very real, if incidental, part of the enterprise; like the utilization of a waste or by-product in manufacturing. Practically, however, the point of view of the courts on this point is unimportant; for the taking must be for some purpose named in the statutes, and the existence of some other reason, such as probable profit, however potent, is in that case immaterial.

Other Methods of Securing the Profit for the Public.—Excess condemnation is not the only method of appropriating for the public the increment in value resulting from a public improvement. Up to the amount of the cost of the improvement this may be done by the levy of local assessments, now in common use in this country[44] and it may be accom-

[42] See in this connection Windsor v. Whitney, 95 Conn. 357 (1920), discussed on p. 36 of this work.
[43] Opinion of Justices, 204 Mass. at p. 610 (1910).
[44] See p. 363.

plished to any desired extent by the imposition of an increment tax, in use in several foreign countries and often suggested for use here. Of these methods only excess condemnation, however, controls the development and use of the neighboring land. By this control the community may also obtain not only the city planning advantages already referred to, but others indirectly of benefit to city property and the city treasury. If, for instance, the city constructs an important public building or group of buildings, and selects a site suited to the purpose where land values are low, the value and usefulness, not only of the neighboring land, but of the principal improvement, will be dependent, to a considerable extent, upon the use made of this neighboring land, and the class of purchasers and tenants secured for it. In a new development, control on a large scale is almost sure, by controlling initial use, to raise values, while neglect of this precaution is equally likely permanently to depress them. In such cases, therefore, excess condemnation safeguards the usefulness and value of the main improvement.

Probable Attitude of United States Courts.—The legal cases on excess condemnation in this country have so far all arisen in state courts, on state statutes, passed under state constitutions not amended to authorize excess condemnation. The question of the validity of these statutes and of the amendments to state constitutions has not yet arisen in the federal courts. In all probability, however, a state which has sustained a statute of excess condemnation in its courts or amended its constitution to authorize it, has nothing to fear in the United States Courts, for two reasons:—the Supreme Court of the United States has already accepted the broad definition of a public use; and it has never yet held a use to be private which the state legislature and constitution, as interpreted by the state courts, has held to be public; and its decisions show that it is very loath to do so.[45]

Zone Condemnation.—Zone condemnation is, as has already been stated, the condemnation of a tract of land of a particular character for replanning in a particular way. The expression is, therefore, one more of city planning than of

[45] See p. 22.

law. In the sense in which the expression is here used, there has been no zone condemnation in the United States. Unquestionably, there are districts in cities in the United States where zone condemnation could be most advantageously employed, and the only question remaining for consideration is whether it would be constitutional.

Similarity of Drainage Schemes; the Boston Back Bay Cases.—Unlike excess condemnation, which is incidental to another, main condemnation, zone condemnation is complete and independent, and may be defined as ordinary condemnation for a specific purpose. The difficulty of introducing zone condemnation in this country is that of convincing the courts of the importance of the proper planning and plotting of slum areas for the promotion of the public health and safety, and of the advantage of carrying out this planning, plotting and reconstruction as a single enterprise. In these days when city planning is so rapidly winning recognition, this should not be difficult. Statutes for the condemnation, replanning, replotting, reconstruction and resale of a tract for a purpose recognized as public, such as securing proper drainage, are not uncommon, and have been sustained by our courts. Thus Massachusetts in 1867 [46] authorized the city of Boston, for the purpose of raising the level of part of the Back Bay district so that it might be properly drained, to condemn the absolute and entire title to an extensive tract of land, traversed by streets, upon which there were, in some cases, buildings and other improvements; to fill it in, and to resell it for private uses. This the city did with profit and success; and the statute under which it was done was held valid by the Supreme Court of Massachusetts and the Supreme Court of the United States.[47]

In sustaining this statute, the Supreme Court of the United States said:—

"In determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enact-

[46] Ch. 308; similar statutes are Mass. Laws 1908, ch. 117 and 1910, ch. 606.

[47] Dingley v. Boston, 100 Mass. 544 (1868); Sweet v. Rechel, 159 U. S. 380 (1895).

ment. It must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. It is a well-settled rule of constitutional exposition, that if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed.[48] . . .

"In Dingley v. Boston, . . . it was objected, that as the act [of 1867] authorized the city to first take the land and thereby transfer to itself the fee without the consent of the owners, and as the only object of the legislature was to abate a nuisance, the act should only have granted power to occupy the land until its object was effected by raising the grade, which being done, the land should have been restored to the owners, applying the benefit received therefrom in offset to the damages. That objection was fully met. Conceding it to be true that the raising of the grade did not require the occupation of the land for a great length of time, and that when the work was completed the nuisance was abated, and the land in a condition to be occupied by private persons, the court said: 'But its condition will be greatly changed; almost as much as raising flats into upland. The former surface will be deeply buried under the earth that will have to be brought upon it, and the changed condition is to be perpetual. If the old property is restored, the new property which has been annexed to it must go with it. This would be very unjust to the city, which has been compelled to incur the great expense of destroying the nuisance, unless the owner were required to make a reasonable compensation, which might be far beyond the amount of the damages to which he would be entitled. It would be difficult to adjust the matter; and in many cases it might operate harshly upon the owner to compel him to take and pay for the improvements. On the whole, therefore, the plan of compelling the city to take the land in fee simple, and the owner to part with his whole title for a just compensation, would seem to be the most simple and equitable that could be adopted; unless there is some objection on the ground that a fee simple is more sacred than an estate for life or years, or than an easement of greater or less duration. We can see no ground for regarding one of these titles as more sacred than another, or for regarding land as more sacred than personal property. . . . It must . . . be left to the legislature to decide what quantity of estate ought to be taken in order to accomplish its purpose, and do the most complete justice to all parties. . . . The Constitution provides for the protection of all private property, and it provides that when the public exigencies require that the property of any individual shall be appropriated to public uses, he shall receive a reasonable compensation therefor. But it leaves the legislature,

[48] Citing Talbot v. Hudson, 16 Gray (Mass.) 417, 422 (1860); Fletcher v. Peck, 6 Cranch (U. S.), 87, 128 (1810); Sinking Fund Cases, 99 U. S. 700, 718 (1878).

without any restriction, express or implied, to decide in each case as it arises, what constitutes such exigency; and, if the land is to be taken, what estate in it shall pass.'"

No more unqualified and complete recognition of both the principles and the methods of zone condemnation is possible than that made in these decisions of the conservative and able Supreme Court of Massachusetts and of the Supreme Court of the United States.

Replotting.—Replotting, or the resubdivision of building land under the police power, is needed as much perhaps in this country as abroad. In the United States land in the outskirts of our cities is not, it is true, divided minutely or into extremely narrow strips, as it is in some foreign countries; but we have, much more commonly than they, the unscientific gridiron system of street planning, often covering vast suburban areas entirely free from improvements. Even the streets, in many cases, although on the map, are not constructed. The great difficulty in introducing a more sensible street plan in those parts of our cities is the subdivision of land into private lots owned by many different individuals and adapted to the projected streets. With replotting these lot lines could be readjusted to new street lines with no more than a trifling inconvenience or expense. As soon as we realize the cost, in so many ways, of the gridiron plan, we shall see the advantages of replanning and the difficulty of so doing without replotting. Our cities, also, are less substantially constructed than foreign cities, and more often devastated by fire, flood or other disaster, and, being more carelessly planned, are in greater need of replanning; of which replotting is a necessary part. Is the employment of the police power for this purpose, supplemented in some cases by the power of local assessment, constitutional, or is replotting only possible under eminent domain, and therefore a practical impossibility?

Replotting under governmental supervision may be justified as a necessary part of planning many parts of our cities, and therefore as a means of promoting the public health, safety, convenience and prosperity. It may also be supported, like

the employment of the power of eminent domain, as an aid to private uses of property most important to the general well-being, the test as to whether eminent domain or the police power should be resorted to in any given case, being whether it is reasonable. It was in applying this test to decide under which of these powers the Back Bay Improvement should have been undertaken that the Supreme Court of the United States said: [49]

"It is not alleged in the pleadings, nor was there any evidence tending to show, that the cost of raising the grade would have been so slight, compared with the real value of the property, that a due regard to the constitution demanded that the owner should have been given opportunity to raise the grade at his own expense, and retain the property in its improved condition."

Uses of Police Power Analogous to Replotting.—Freund, in his admirable book on the police power [50] states the case for the employment of the police power for a private interest that is also public, forcibly, but more apologetically than, in the light of recent cases, seems necessary, as follows:—

"While in general a person will not be compelled to improve his land in a particular manner, the principle suffers some modification where the improvement (without being strictly or directly public, though perhaps remotely and indirectly so) is common to several adjoining estates. In one aspect the compulsion is exercised in favor of other persons, and thus resembles the legislation allowing the construction of private ways, drains and ditches across the lands of others. . . . But in the cases to be now considered the owner whose land is affected by the exercise of the power shares in the benefit of the improvement to which he is made to contribute, and because he does so share he may be compelled to bear a part of the cost of the joint enterprise."

As other instances of compulsory joint improvement Freund cites [51] party walls and divisions fences.

Analogies to Drainage and Irrigation.—A striking example of this use of the police power supplemented by the

[49] Sweet v. Rechel, 159 U. S. 380 at 393 (1895).
[50] Sec. 440.
[51] Secs. 443-444.

power of local assessment [52] is furnished by the drainage and irrigation laws in this country, which, as Freund says: [53]

"provide that where a number of pieces of land are so situated that either the improvement can be undertaken only jointly, or that the joint improvement will be more effective or more economical than individual works, a stated number or proportion, usually a majority in interest or area, of owners may petition the proper authorities for the creation of a drainage or irrigation district, which may include the lands of non-consenting owners. After notice and hearing which is constitutionally indispensable, if a proper case is made out, the district is made a quasi-public corporation, commissioners are elected or appointed for the management of the work, and the expense is assessed upon the owners according to the benefit received by each. . . . It is true that ordinarily an owner will not be forced to improve his land merely to increase the general prosperity of the country; nor will one party be forced into a partnership with another, because the interests of both can be better served by joint than by individual action. But lands may be so situated toward each other as to create a mutual dependence and a natural community. The exercise of the police power then consists in applying to this community the same principle of majority rule which is recognized, as a matter of course, for local purposes in larger neighborhoods constituting political subdivisions."

There are drainage laws similar in principle in most if not all the civilized countries of the world.

The drainage of a tract of low lying land belonging to a number of owners, in order to make it useful or increase its usefulness, resembles, in every essential feature, the replotting of a similarly owned tract which is unavailable because of faulty subdivision.

The doctrine stated by Freund now has the endorsement of the Supreme Court of the United States. In Fallbrook Irrigation District v. Bradley [54] that court in 1896, said with regard to the irrigation of private land in California:—

"The case does not essentially differ from that of *Hagar v. Reclamation District,* 111 U. S. 701, where this court held that the power of the legislature of California to prescribe a system for reclaiming

[52] Local assessment is insufficient, because a measure of control over the land must be exercised.

[53] Sec. 441.

[54] 164 U. S. 112 (1896).

swamp lands was not inconsistent with any provision of the Federal Constitution. The power does not rest simply upon the ground that the reclamation must be necessary for the public health. That indeed is one ground for interposition by the State, but not the only one. Statutes authorizing drainage of swamp lands have frequently been upheld independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property. *Head v. Amoskeag Manufacturing Co.,* 113 U. S. 9, 22; *Wurtz v. Hoagland,* 114 U. S. 606, 611; Cooley on *Taxation,* 617 (2d ed.). If it be essential or material for the prosperity of the community, and if the improvement be one in which all the landowners have to a certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all or nearly all of such owners by reason of the peculiar natural condition of the tract sought to be reclaimed, then such reclamation may be made and the land rendered useful to all and at their joint expense. In such case the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit.

"Irrigation is not so different from the reclamation of swamps as to require the application of other and different principles to the case."

In 1915, the Supreme Court of the United States reaffirmed the opinion it gave in the Fallbrook case, and in so doing said:—[55]

"In *Drainage District No. 1 v. Richardson County,* 86 Nebraska 355 . . . the Supreme Court of Nebraska said upon this point: 'That question was decided by this Court in the case of Neal v. Vansickle, 72 Nebraska, 105. It was there said . . . "In our opinion, it is too late in the day to contend that irrigation of arid lands, the straightening and improvement of water courses, the building of levees and the draining of swamp and overflowed lands for the improvement of the health and comfort of the community, and the reclamation of waste places and the promotion of agriculture, are not all and every of them subjects of general and public concern, the promotion and regulation of which are among the most important of governmental powers, duties and functions." . . . We see no reason at this time to depart from that opinion, and therefore this contention must be considered foreclosed so far as this court is concerned.' . . .

"We find no ground for a contrary view as to the nature of the authorized enterprise. . . . It has been held that it is not necessary

[55] O'Neill v. Leamer, 239 U. S. 244 (1915).

that the state power should rest simply upon the ground that the undertaking is needed for the public health; there are manifestly other considerations of public advantage in providing a general plan of reclamation by which wet lands throughout the State may be opened to profitable use. (*Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 163.)"

Analogies to Compulsory Joint Improvements.—Lewis on *Eminent Domain*[56] cites the decisions rendered and the various statutory and constitutional provisions passed on the subject of compulsory joint improvements up to the date of the publication of his book, as based on eminent domain. Nichols, however, in the recent edition of his work on eminent domain, issued in 1917, adopts the view here maintained. He says:—

"Sec. 105. *Legislation Aimed to Prevent the Tieing up of Productive Property.* . . . There is one example of this branch of the police power which strongly resembles an exercise of the power of eminent domain, although it is held by the courts that it does not involve a taking of property, or require the public use for its justification. When property in which several persons have a common interest cannot be fully and beneficially enjoyed in its existing condition and the parties interested therein cannot agree upon a scheme for the more advantageous use of the property, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making just compensation to any of the proprietors whose control of the property or interest therein has been modified by the new arrangement, which compensation those of the proprietors who are benefitted are obliged to pay. Familiar examples of this class of legislation are the statutes providing for the repair of houses, mills and wharves owned by several parties, the employment of ships held on shares, the partition of land held in common, the construction and maintenance of party walls, the government of the proprietors of private ways and bridges and common fields and the drainage of swamps and meadows.

"The exercise of this power in most instances is upon property held in common, but the principle is the same if applied to a tract of land affected by common necessities and interests, although divided into parcels held by individual owners in severalty. When a tract of such land is divided into several parcels held by different owners and a general improvement of the whole cannot be effected without the harmonious co-operation of all the owners, the common necessity

[56] Third edition, 1909, Sec. 283 and ff.

is met and the common interest secured by the intervention of the state, and the individual rights of each owner are subjected to such modifications as seem most adapted to secure the best advantage of all. Those who are damaged are compensated by those who are benefitted. Land is actually taken and pecuniary impositions are levied although the use is not public, but neither the power of eminent domain nor the power of taxation is exercised. No land outside the tract affected by the common interest is taken or assessed, and it is settled that the compulsory improvement of the tract in the manner described is a valid exercise of the police power." [57]

The more or less technical arguments for and against the constitutionality of excess condemnation, zone condemnation and replotting have been considered at some length; and properly, too, for the people of the United States is a legalistic people, and these are the terms in which it thinks. The fundamental question, however, is the need of these powers in this country. In the decision foreign usage and experience, invaluable as they may be, are not conclusive. The question is one of the necessity and effectiveness of these remedies for us, and it is the people of this country who must decide it. In condemnation proceedings public use is only a more technical name for public benefit; and in a democracy public policy is determined by public opinion which the courts sooner or later ratify and announce; for, as the Supreme Court of the United States, in a passage widely quoted with approval, says of the police power —and it is equally true of the power of eminent domain—it

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[57] See in this connection also *Ruling Case Law,* Vol. 10 Eminent Domain, secs. 4, 47-53.

In the case of O'Neill v. Leamer, 239 U. S. 244 (1915), it should be noticed that resort was had to the power of eminent domain because the lands to be condemned "did not receive the flood waters of the creek but were situated . . outside the drainage district," and thus were not affected by the common interests and necessities, but condemned for the benefit of the tracts which were so affected in common. In the case of Houck v. Little River Drainage District, 239 U. S. 254 (1915), the court stated that the levies for the improvement were local assessments. This is perhaps due to the fact that the improvement was carried on by a quasi-public corporation, on a large scale; and would not necessarily be true of replotting. If, however, the same results are obtained in this country by the same methods as abroad or those which are equally advantageous—and this the decisions would seem to allow—the names of the powers under which, in the opinion of the courts, this is accomplished, will, except to legal theorists, be immaterial.

"extends to all the great public needs—It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." [58]

Note B

No. 1. Massachusetts, Amendment to Constitution [59]

Article XXXIX

Article ten of part one of the Constitution is hereby amended by adding to it the following words:—

Powers of the legislature relative to the taking of land, etc., for widening or relocating highways, etc.

The legislature may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the commonwealth, or by a county, city or town, of more land and property than are needed for the actual construction of such highway or street: *Provided, however,* that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street, and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions.

No. 2. Ohio, Amendment to Constitution [60]

Art. XVIII, Sec. 10. A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law.

No. 3. Wisconsin, Amendment to Constitution [61]

Acquisition of lands by the state.

Art. XI, Sec. 3a. The State or any of its cities may acquire by gift, purchase, or condemnation lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds,

[58] Noble State Bank v. Haskell, 219 U. S. 104 at 111 (1911).
[59] Adopted 1911.
[60] Adopted 1912.
[61] Adopted 1912.

streets, squares, parkways, boulevards, parks, playgrounds, sites for public buildings, and reservations in and about and along and leading to any or all of the same; and after the establishment, layout, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate, so as to protect such public works and improvements, and their environs, and to preserve the view, appearance, light, air, and usefulness of such public works.

No. 4. New York, Amendment to Constitution[62]

Art. I, Sec. 7. The legislature may authorize cities to take more land and property than is needed for actual construction in the laying out, widening, extending or re-locating parks, public places, highways or streets; provided, however, that the additional land and property so authorized to be taken shall be no more than sufficient to form suitable building sites abutting on such park, public place, highway or street. After so much of the land and property has been appropriated for such park, public place, highway or street as is needed therefor, the remainder may be sold or leased. Excess condemnation.

No. 5. Rhode Island, Amendment to Constitution[63]

Art. XVII, Sec. 1. The general assembly may authorize the acquiring or taking in fee by the state, or by any cities or towns, of more land and property than is needed for actual construction in the establishing, laying out, widening, extending or relocating of public highways, streets, places, parks and parkways: *Provided, however,* that the additional land and property so authorized to be acquired or taken shall be no more in extent than would be sufficient to form suitable building sites abutting on such public highway, street, place, park or parkways. After so much of the land and property has been appropriated for such public highway, street, place, park or parkway as is needed therefor, the remainder may be held and improved for any public purpose or purposes, or may be sold or leased for value with or without suitable restrictions, and in case of any such sale or lease the person or persons from whom such remainder was taken shall have the first right to purchase or lease the same upon such terms as the state or city or town is willing to sell or lease the same.

No. 6. New Jersey Statute, 1870

Chapter CXVII. A Further Supplement to the act entitled "An Act to Revise and Amend the Charter of the City of Newark," approved March eleventh, eighteen hundred and fifty-seven. Preamble.

[62] Adopted 1913.
[63] Adopted 1916.

WHEREAS, a certain portion of the City of Newark, formerly belonging to the Township of Clinton, and known as "Clinton Hill," has been heretofore laid out with narrow, short and irregular streets and passageways, by private owners of property without any municipal authority, and without reference to adjoining property, or to connecting streets, or to the public interest or convenience, which streets have been to some extent built upon, and thus the danger from fire by reason of their narrowness has been greatly increased; and whereas, it is very desirable to continue the policy which has been pursued for many years by the city authorities, of laying out streets and avenues upon a general plan, which shall secure, as far as possible, uniformity, proper width, good ventilation, and reasonable security against fire; and whereas the commissioners appointed by the common council for that purpose, now engaged in the examination of the streets in the section of the city above described, find it impracticable under existing laws to remedy the difficulties, or to secure the desirable results above mentioned; therefore

Commissioners authorized to purchase certain described lands, etc.

1. BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*, That the commissioners appointed by the common council of the city of Newark, pursuant to an act of the legislature of this State, approved April first, eighteen hundred and sixty-nine, and entitled "A supplement to the act authorizing the appointment of commissioners to lay out streets, avenues and squares in the city of Newark," approved March twentieth, eighteen hundred and fifty-seven, are hereby appointed commissioners with full power and authority to purchase at their discretion, all or any part of the lands, real estate, buildings and improvements within the limits described as follows, to wit:

[Here follows a description of the tract.]

and to make such compensation therefor to the owner or owners thereof, as they may deem reasonable, and to receive from the said owner or owners conveyances of the same to the city of Newark; in case no agreement for such purchase can be made with said owners, the said commissioners shall thereupon proceed to* (take said tract by eminent domain).

*2. Authority to issue bonds for payment of land, etc.

*3. Commissioners may vacate and lay out streets and highways.

*4. Commissioners shall lay out the lands in lots and sell the same.

*5. If proceeds are insufficient the deficit to be assessed on adjacent land.

*6. Surplus to be distributed to owners of the lands.

*7. Commissioners shall take oath, etc.

8. *And be it enacted*, That this act shall take effect immediately.

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* Summarized.

No. 7. Ohio Statute, 1904[64]

Sec. 3677. Municipal corporations shall have special power to appropriate, enter upon and hold, real estate within their corporate limits. Such power shall be exercised for the purposes, and in the manner provided in this chapter. Appropriation of property.

. . . . . .

12. For establishing esplanades, boulevards, parkways, park grounds, and public reservations in, around and leading to public buildings and for the purpose of reselling such land with reservations in the deeds of such resale as to the future use of such lands, so as to protect public buildings and their environs, and to preserve the view, appearance, light, air and usefulness of public grounds occupied by public buildings and esplanades and parkways leading thereto.

No. 8. Oregon Statute, 1913[65]

Sec. 3837. *Power granted certain cities to appropriate land for parks, playgrounds, etc.* That it shall be lawful and the right is hereby conferred upon any incorporated city of this state having ten thousand inhabitants or more to purchase, acquire, take, use, enter upon and appropriate land and property for the purpose of public squares, parks, playgrounds, comfort stations, or enlarging any public square, park, playground or comfort station within the corporate limits of any such city whenever the municipal authorities thereof shall by ordinance determine thereon.

Sec. 3838. *Appropriation of land by certain cities in excess of what may be needed for public squares, etc.* It shall be lawful for, and the right is hereby conferred upon any incorporated city of this State having 10,000 or more inhabitants to purchase, acquire, take, use, enter upon and appropriate land and property in excess of what may be needed for any such public squares, parks, or playgrounds; provided, however, that in the ordinance providing therefor the municipal authorities thereof shall specify and describe the land authorized to be taken, purchased, acquired, used and appropriated, which land shall not embrace more than 200 feet beyond the boundary line of the property to be used for such public squares, parks, or playgrounds, in order to protect the same by the re-sale of such neighboring property with restrictions whenever the councils thereof shall by ordinance determine thereon; provided, further, that in the said ordinance the councils thereof shall declare that the control of such neighboring property within 200 feet of the boundary lines of

[64] Being an amendment to the Municipal Code of 1902, made by 97 v. 333, 1904; now *Ohio General Code*, 1910, sec. 3677, par. 12.

[65] Ch. 269, secs. 1-4; now Laws 1920, secs. 3837-3840.

such public squares, parks, or playgrounds, is reasonably necessary, in order to protect such public squares, parks or playgrounds, their environs, the preservation of the view, appearance, light, air, health or usefulness thereof.

SEC. 3839. *Sale of land appropriated in excess of what needed may be resold.* That after so much of said land and property referred to in Section 3838 has been appropriated, as is needed, for public squares, parks or playgrounds aforesaid, the municipal authorities of such city may by ordinance authorize the sale of the remainder of such land or property and impose such restrictions in any deed or deeds of resale as may be deemed necessary or proper; provided, however, that such ordinance shall specify correctly and describe the land or property to be sold, and the restrictions in regard to the use thereof as will fully insure the protection of such public squares, parks or playgrounds, their environs, the preservation of the view, appearance, light, air, health or usefulness thereof, whenever the councils thereof shall by ordinance determine thereon and which are to be imposed and inserted in such deed or deeds of resale.

SEC. 3840. *Such appropriations declared public use.* That the taking, using, acquiring and appropriating of private property for any of the purposes herein specified, is hereby declared to be taking, using and appropriating such private property for public use; provided, however, that the proceeds arising from the resale of any neighboring property taken in excess of what may be necessary for the actual construction, opening, widening, extending and laying out of any such public square, park or playground, as in this act provided, shall be deposited in the treasury of said city and be used in the payment of the interest and as a sinking fund to retire any bond issues herein authorized. Any surplus arising from such transaction shall be turned over to and for the use of the park department of such city.

No. 9. VIRGINIA STATUTES, 1906-1916[66]

SEC. 3065. *To empower cities and towns to acquire property adjoining parks, monuments, etc., and to dispose of same.* Any city or town of this Commonwealth may acquire by purchase, gift, or condemnation, property adjoining its parks, or plats on which its monuments are located, or other property used for public purposes, or in the vicinity of such parks, plats, or property, which is used and maintained in such a manner as to impair the beauty, usefulness or efficiency of such parks, plats, or public property, and may likewise acquire property adjacent to any street, the topography of which, from its proximity thereto, impairs the convenient use of such street, or renders impracticable, without extraordinary expense, the im-

[66] Now Code of 1919, sec. 3065.

provement of the same, and the city or town so acquiring any such property may subsequently dispose of the property so acquired, making limitations as to the use thereof, which will protect the beauty, usefulness, efficiency or convenience of such parks, plats or property.

And any city or town in this commonwealth proposing to open or widen a street by taking any part of a block or square in such a manner that the value of the property abutting the proposed street, would be injuriously affected unless the property on such block or square is re-platted and the property line re-adjusted, then and in that event the city or town at the same time it acquires the land for said street may, in its discretion also acquire by purchase, gift, condemnation or otherwise, all or any part of the property on such squares or blocks and may subsequently replat and dispose of the property so acquired, in whole or in parts, making such limitations as to the uses thereof as it may see fit.

No. 10. Massachusetts Act, Passed Under Constitutional Amendment of 1911 [67]

The city of Worcester may take land for widening Belmont street.

Sec. 1. The city of Worcester is hereby authorized to take in fee for the purpose of widening Belmont street, so-called, in that city, the whole or parts of a strip of land, not exceeding one hundred and sixty feet in depth, from the southerly side of Belmont street between the point of intersection of the easterly line of Warden street with the southerly line of Belmont street easterly to the point of intersection of the westerly line of Lake avenue with the southerly line of Belmont street.

Remainder of land may be sold.

Sec. 2. After so much of the land or property as is taken by the city for the purpose of widening Belmont street on the southerly side thereof, in accordance with the provisions of section one, has been appropriated for such street as is needed therefor, the city may sell the remainder for value, with or without suitable restrictions.

Sec. 3. This act shall take effect upon its passage.

No. 11. New York Act, Passed Under Constitutional Amendment Adopted 1913

NEW YORK CITY CHARTER

Authority of city to acquire land for streets, parks, etc., definitions; power to condemn excess lands.

Sec. 970-a.[68] When used in this section or section nine hundred and seventy-b of the Greater New York charter, unless otherwise

[67] 1912, ch. 186.

[68] Sec. 970-a, and 970-b, were added by 1916, ch. 112; reënacting substantially 1915, ch. 593, inadvertently repealed by 1915, ch. 606.

expressed stated, or unless the context or subject-matter otherwise requires, the word "improvement" shall be construed as synonymous with the phrase "laying out, widening, extending or relocating a park, public place, highway or street," or with the phrase "acquisition of title to real property required for laying out, widening, extending or relocating a park, public place, highway or street." The term "excess lands," or the term "additional lands," or the term "additional real property" shall each be construed as synonymous with the phrase "real property in addition (or additional) to the real property needed (or required) for laying out, widening, extending or relocating a park, public place, highway or street." "The board" shall be construed as synonymous with the "board of estimate and apportionment." The city of New York in acquiring real property for any improvement may acquire more real property than is needed for the actual construction of the improvement. The board of estimate and apportionment may authorize the city of New York to acquire additional real property in connection with any improvement, and direct that the same be acquired with the real property to be acquired for the improvement; provided that such additional real property shall be not more than sufficient to form suitable building sites abutting on the improvement. The title which the city of New York shall acquire to additional real property shall in every case be the fee simple absolute. Additional real property shall be acquired by the city in connection with a street improvement only when the title acquired for the improvement shall be in fee. The acquisition of title to additional real property in connection with an improvement shall be authorized by the board in the same manner and at the same time as the acquisition of title to the real property required for the improvement is authorized. When the board shall have authorized the acquisition of title to additional real property in connection with an improvement, title to such additional real property shall be acquired by the city in the manner and according to the procedure (except in such respects as herein set forth) provided for the acquisition of title to the real property required for the improvement and in the same proceeding in which title to the real property required for the improvement shall be acquired. When the board shall authorize the acquisition of additional real property in connection with any improvement, it shall cause to be prepared and shall adopt a map showing the real property to be acquired for the improvement and such additional real property in connection with the real property to be acquired for the improvement, and such map, when approved by the mayor, shall be certified by the secretary of the board and filed, prior to the application to condemn the same, as follows: One copy thereof in the office in which conveyances of real property are required by law to be recorded in each county in which the real property or any part thereof shown on such map is situated; one copy thereof in the

office of the corporation counsel; one copy thereof in the office of the president of each borough in which the real property or any part thereof shown on such map is situated, and one copy thereof in the office of the board. When the board shall have authorized the acquisition of additional real property in connection with any improvement, such additional real property shall be separately described in the notice of application to condemn by the supreme court without a jury or in the notice of application for the appointment of commissioners of estimate, as the case may be, and in the petition presented on any such application, and separately shown on the rule map attached to the petition and on the damage map in the proceeding, and said notice and petition shall state what part of the real property to be condemned is required for the improvement, and what part thereof is to be acquired as additional real property. The acquisition of such additional real property, when authorized by the board, shall be deemed to be for a public purpose. In a proceeding in which additional real property shall be acquired, the board, by a three-fourths vote, may direct that on the date of the entry of the order granting the application to condemn by the supreme court without a jury, or on the date of the filing of the oaths of the commissioners appointed by the court, as the case may be, or on a date after either, specified in the resolution of the board, the title to the whole but not less than the whole of such additional real property to be acquired in the proceeding shall vest in the city of New York, provided that such resolution shall also direct the vesting in said city simultaneously of the title to all of the real property being acquired in the proceeding for the improvement; except that in a proceeding involving the acquisition of title to additional real property in connection with the acquisition of title to real property required for a street, highway or public place, the board shall not be required to vest, at one time, the title to all the additional real property to be acquired, provided, however, that in vesting title to parts of said additional real property every such part shall be of at least a block length along the improvement, and that no fractional portion of a block shall be contained in any such part, and provided that said board shall also direct that all the real property required for the street, highway or public place in such block or blocks shall vest in the city simultaneously. Upon the date of the entry of such order granting the application to condemn or upon the date of the filing of such oaths, as the case may be, or on such date after either, as may be specified by said board, the city of New York shall be and become seized in fee simple absolute to such additional real property. In all other cases, except as herein otherwise provided, title in fee simple absolute to such additional real property as may be acquired in any such proceeding shall vest in the city of New York upon the filing of the final decree of the court, or upon the entry of the order of the

court confirming the report of the commissioners of estimate, as the case may be, as to such additional real property; and the reversal on appeal of the final decree or of the order confirming the report, as the case may be, or of any part of either, shall not operate to divest the city of title to any of the real property so acquired. In a proceeding in which excess lands shall be acquired, the board shall not have power to direct the vesting of title in the city to the real property required for the improvement without also directing the vesting of title in the city simultaneously to the excess lands being acquired in the proceeding in connection with the improvement, except that the board may, in the manner in this section provided, direct that title to the real property required for a street, highway or public place shall vest in the city of New York in any block of such street, highway or public place abutting which no excess lands are taken. In any proceeding in which excess lands shall be acquired, when title to any part less than the whole of the real property required for the street, highway or public place in any one block thereof, between legally existing public streets, shall vest in said city upon and by virtue of the entry of the decree of the court finally determining the awards for damages therefor, or on the date of the entry of the order confirming the report of the commissioners of estimate in relation thereto, as the case may be, title to the remainder of the real property required for the street, highway or public place in the same block and title to the additional lands to be acquired in the proceeding abutting on the street, highway or public place in the same block, shall vest in said city simultaneously, and the reversal on appeal of the final decree of the court or of the order confirming the report of commissioners, as the case may be, or of any part of either shall not operate to divest the city of title to any of the real property so acquired for the street, highway or public place in the same block or to the additional lands abutting thereon. Upon the vesting of title in the city of New York, as in this section provided, to any such additional lands and to lands required for the improvement, the city of New York, or any person acting under its authority, may immediately, or at any time thereafter, take possession of the additional lands so vested and of the real property required for the improvement so vested, or any part or parts thereof, without any suit or proceeding at law for that purpose. In a proceeding in which additional lands shall have been authorized to be acquired in connection with the improvement, an owner may not convey to the city of New York any part of the real property to be acquired for the improvement, except upon the approval of the board of estimate and apportionment and of the commissioners of the sinking fund. After the institution of a proceeding pursuant to this title, the board of estimate and apportionment may amend the proceeding by authorizing the acquisition of lands additional to those required for the improve-

ment, provided that title shall not have vested in the city of New York to any parcel of real property to be acquired for the improvement within the block between legally existing public streets, embracing the additional lands sought to be acquired. The said board may also amend any proceeding so as to exclude any or all additional lands being acquired in the proceeding, provided title to such additional lands shall not have vested in the city. The amendment shall be made in the manner provided in this title, and thereafter the proceeding shall be conducted in the same manner as if the additional lands included or excluded by the amendment had been included or had not been included in the proceeding at the time of the institution thereof. In case title to the real property required for the improvement and to the additional lands shall vest in the city prior to the entry of the final decree or order confirming the report of the commissioners, as the case may be, interest on the entire amount due to the owner for the real property acquired for the improvement, or for the excess lands, or for both, from the date of the vesting of title thereto to the date of the final decree or to the date of the report of the commissioners of estimate, as the case may be, shall be awarded as a part of such owner's compensation. All of the provisions of this title relative to the payment by the comptroller of sums awarded as damages and interest thereon, and to the advance payment on account of such damages, and relative to the assignment or pledge of awards, shall apply to awards of damages for the taking of additional lands. After title to the real property required for the improvement and to the additional lands shall have vested in the city, the additional lands may be either held and used by the city, or sold or leased by it in the manner provided by the Greater New York charter. The board of estimate and apportionment may provide that such additional lands shall be sold or leased subject to such restrictions, covenants or conditions as to location of buildings with reference to the real property acquired for the improvement, or the height of buildings or structures, or the character of construction and architecture thereof, or such other covenants, conditions or restrictions as it may deem proper; and such additional lands shall be sold or leased subject to such restrictions, covenants or conditions, if any, as the board of estimate and apportionment may have prescribed, which shall be set forth in the instrument of conveyance or lease.

Authority to Assess and the Ascertainment of the Amount Properly Assessable in a Proceeding in Which Additional Lands May Be Acquired

SEC. 970-b.[69] In every proceeding in which lands additional to those required for the improvement shall be acquired, the board may

[69] See p. 153, note 68.

determine whether any, and if any, what portion of the damage due to the acquisition of title to the real property required for the improvement, shall be borne and paid by the city of New York; and the whole or the remainder of such damages shall be assessed upon the real property deemed to be benefited by the improvement in the manner and according to the procedure for levying assessments for benefit in proceedings had under this title. The board may also determine whether any, and if any, what portion of the costs and expenses of proceeding, including the expenses of the bureau of street openings in the law department, incurred by reason of such proceeding, shall be borne and paid by the city of New York, and the whole or the remainder of such costs and expenses, including the expenses of the bureau of street openings, shall be assessed upon the real property deemed to be benefited by the improvement. Where part of a parcel of real property shall be acquired for an improvement, and the remainder or a portion of the remainder of such parcel in the same ownership shall be acquired in the same proceeding as excess lands, the portion of the damages due to the acquisition of the real property required for the improvement, shall be determined and stated separately from the entire damage due to each such owner. In determining the damages due to the acquisition of that portion of such parcel, which is required for the improvement (which shall be the portion thereof properly assessable), the same rule shall be applied as would govern the determination of damages for the taking of the real property required for the improvement, in case no excess lands were acquired. Where part of a parcel of real property shall be acquired for the improvement, and the remainder or a portion of the remainder thereof in the same ownership shall be acquired in the same proceeding, as excess lands, the damages due to the acquisition of title to the real property required for the improvement (which shall constitute the portion of the owner's total damages as to such parcel, on account of the proceeding, which shall be properly assessable), shall, in every case, equal the amount which would be awarded to such owner in case only that part of his real property, which shall be required for the improvement, were acquired. The aggregate of damages due to the acquisition of the real property required for the improvement shall be determined by the court or other tribunal authorized to determine the compensation to be paid to the owners, and when so determined, as aforesaid, shall, if the board of estimate and apportionment so direct, be assessed by the court or other tribunal authorized to levy the assessment for the improvement. The real property acquired by the city in addition to that required for the improvement shall be subject to assessment for benefit due to the improvement, and shall bear its proper share of the cost and expense of the proceeding, which may be levied and collected with the taxes upon the real property in one or more entire

boroughs. The assessment, which shall be levied in any proceeding, upon the real property acquired in addition to that required for the improvement, shall not in the case of any parcel assessed exceed one-half the fair value thereof. Interest from the date of the vesting of title to the date of the final decree of the court or to the date of the final report of the commissioners, as the case may be, on the sum or sums determined as damages due to the acquisition of the real property required for the improvement, as hereinbefore provided, shall be included in and stated as a part of such damages due to the acquisition of title to the real property required for the improvement. Nothing in this section contained shall be construed as authorizing the awarding to an owner, part of whose real property is taken for the improvement, and the remainder or a portion of the remainder of whose real property is taken as additional lands, any greater amount of compensation than such owner shall be entitled to, by reason of the taking of his real property for the improvement and as additional lands, considered together as one parcel. The provisions of section nine hundred and seventy-a and of this section shall be construed as supplementing and extending the effect of the provisions of the other sections of this title so as to provide for the acquisition of title to additional lands in connection with an improvement and for the levying of assessments for benefit in such proceedings and nothing in section nine hundred and seventy-a or in this section contained shall be construed as limiting the effect of the provisions of the other sections of this title in their application to the acquisition of title to real property required for an improvement when acquired in a proceeding in which additional lands shall or shall not be acquired or to the levying of assessments for benefit in such proceedings, except as the provisions of the other sections of this title are in section nine hundred and seventy-a and in this section expressly so limited in their application.

No. 12. Rhode Island, Act Passed Under Constitutional Amendment Adopted 1916[70]

City of Providence may acquire more land and property than actually needed for highway construction and improvement, when.

Sec. 1. Whenever any public highway in the city of Providence shall be laid out . . . the city of Providence may acquire or take in fee more land and property than is needed for actual construction in the establishing, laying out, widening, extending or relocating of such public highway or street: *Provided, however,* that the additional land and property so authorized to be acquired or taken shall be no more in extent than would be sufficient to form suitable building sites abutting on such public highway or street; *and provided, further,* that the provisions of this act shall apply only in the particular instances in which the city council of said city shall by special vote so provide.

[70] Being 1917, ch. 1560.

*Sec. 2-3. Procedural.

Additional land as taken, but not used, how disposed of.

Sec. 4. After so much of the land and property has been appropriated for such public highway or street as is needed therefor, the additional land and property so taken in fee may be held and improved by said city of Providence for any public purpose or purposes, or, by resolution of said city council, may be sold or leased for value with or without suitable restrictions, and in case of any such sale or lease the person or persons from whom such additional land and property was taken shall have the first right to purchase or lease the same upon such terms and conditions as said city council is willing to sell or lease the same.

Sec. 5. This act shall take effect upon its passage.

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* Summarized.

CHAPTER IV

PUBLIC UTILITIES—THE WATER FRONT

Definitions.—A public utility is, in law, a service rendered the general public of such a nature and importance as to constitute it a common necessity or general convenience, the provision of which cannot with safety be left to the unrestrained enterprise of private individuals. The power to supply such services is therefore granted individuals substantially under conditions of regulated monopoly, or, if need be, they are performed by the government itself. In practice the expression is used to denote a service, such as the furnishing of water, gas, electricity, heat, power, transportation, etc. In the decision of the question which services shall be held to be public utilities, historical considerations have great influence; but of recent years present conditions have caused additions to the list of such utilities to be made. Private corporations rendering such services are often referred to as public utility corporations, and, by reason of the public service performed by them, are considered quasi-public and granted certain public powers, such as eminent domain.

Transportation.—Most, if not all, of the public utilities have their place in the city plan. For this reason the granting of the franchises to public utility corporations and their regulation should be carefully considered. Of most importance among these utilities—indeed probably the greatest single influence of any kind on the city plan—is transportation, the only utility that must precede the substantial growth in population of any locality, important as it is that the others should follow as speedily as possible. The planning problems with relation to transportation and transportation corporations are typical

of those arising with regard to these other utilities, and will be treated here as illustrative of them all.[1]

Transportation makes and changes the character of streets and districts and determines the distribution of population, bringing, if efficient, distant parts of the city, for all practical purposes, near the center, or if inefficient, keeping nearby parts in effect at a distance from that center. Not only routes, amount, speed and comfort of service, but rates of fare, make the virtual city plan. It has always been assumed that only a small proportion of the population of a city will live beyond the range of a five-cent fare. Expensive subways are profitable only where there are multiple dwellings, and soon cause the private house along their route to be replaced by the tenement. In these and countless other ways which are well recognized by city planners and transport experts, transportation builds the city. If uncontrolled, the planning of construction for this purpose is done by many irresponsible, conflicting agencies in their own interest. If the public interest is to prevail, the public must regulate and control these agencies, or itself undertake to perform the services they render.

Methods of Public Control.—The public authorities may exercise control over public service corporations in several ways:—first, by the terms of the franchises granted the promoters, such as the right to be a public service corporation, the conditions in accordance with which that corporation is allowed to use the public streets, and the concessions demanded of the corporation in return for receiving additional rights; second, by the amendment of the charter, if the right to amend it is reserved; third, by regulating rates and service, under the police power, which the public may do in spite of the fact that the charter is a contract and even if there is no reservation of the right of amendment, alteration, or repeal; fourth, by granting a charter to a competing corporation, by itself com-

[1] See in this connection "Unification of Railroad Lines and Service in Cities," being a statement of principles drawn up by a Committee of the National Conference on City Planning for presentation to the conference held April, 1920; published in its proceedings, p. 56 and in the *National Municipal Review*, June, 1920, p. 351, under the title, "Railroads in a Sound City Plan."

peting, or by threatening to take one or the other of these courses; fifth, by condemning the rights and property of the corporation and itself furnishing the utility.

The Power to Grant and Change the Charter.—The charter giving individuals the right to be a corporation is granted by the state. Transportation enterprises, like most other utilities, by reason of the amount of capital involved and the liabilities incurred, are virtually forced to incorporate and thus subject themselves to a greater degree of public control than individuals. The charter also confers upon the corporation the privilege of engaging in the business of furnishing a particular utility in a given locality, and includes the conditions in accordance with which the business must be transacted, states the duration of the franchise, and the terms, if any, under which the public may take over the rights and property of the corporation. The grant of additional privileges also comes from the state, and in return for them any demands which seem necessary may be made upon the corporation. Like all large enterprises, transportation companies, with changing business conditions, are constantly in need of legislative assistance in the way of new authority. Thus they may need to take additional property by eminent domain, change their motive power, or their routes. The public may make these favors conditional on extensions or improvements of service. It is the state also which possesses the power to amend the charter, if such power exists. A charter, under our law, has been held to be a contract the provisions of which are subject to the police power but cannot be altered, nor can the charter be revoked, unless these rights are reserved. This was early decided by the Supreme Court of the United States in the famous Dartmouth College case.[2] The decision is now generally regarded as unfortunate and its effect has been in large part counteracted by statutes, now universal, making all charters subsequently issued subject to alteration, amendment and repeal.[3] These

[2] Dartmouth College v. Woodward, 4 Wheaton (U. S.) 518 (1819).

[3] The device was suggested in one of the opinions in the case. The statutes often make the acceptance of any amendment of the charter by the corporation an agreement that the charter itself shall thereafter be subject to amendment, alteration and repeal. Amendments are also subject to these rights.

statutes do not leave the corporation without protection. If the charter is repealed, the corporation cannot be deprived of its property; and furthermore the legislature is only authorized by amendment "to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right." [4]

Route and Location.—The city is generally given by the state the power to prescribe the route which the corporation must follow in traversing the city, and the locations which the corporation must adopt in the streets through which it goes. This power enables the city to make the utility conform to and aid the planning of the city in the general interest. This route and these locations, the city may under its police power require the corporation to change at its own expense, except as the state has granted the corporation a specific route or specific locations; and even then minor changes may be enforced.

Rates and Facilities.—As a public carrier the transportation company in the city is not free to earn for its stockholders any dividend it can by charging any fare it is able to collect. In the absence of a contract with the authorities granting it better terms, the company is entitled at most to a reasonable return on the money it has actually invested. Moreover, having devoted its property to a public use, it has thereby obligated itself to render a service at rates which shall not exceed the reasonable value of that service, even if by misfortune or bad judgment it cannot, in any particular case, earn its full return. Nor is it the judge of what facilities it shall offer. These facilities must in every way be adequate. The company and its stockholders are protected, however, by this doctrine of reasonableness, and by constitutional provisions against taking property without compensation; for the making of unreasonable requirements under which the company would not be allowed to earn a fair return is in effect a taking.

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[4] N. Y. and N. E. R. R. Co. v. Bristol, 151 U. S. 556 (1894). See generally, Cook, *Corporations* (7th ed., 1913), Vol. 2, sec. 501; Thompson, *Corporations* (2d ed., supplement), sec. 414.

The problem most difficult, perhaps, of settlement with fairness both to the public and to the transportation companies, is the rate of fare that may be charged. In this country a flat rate for the city and its suburbs has been considered more for the public interest than zones of fare, so common abroad, on the ground that the zone fare tended to keep the people in the congested parts of the city, while a flat rate encouraged them to live in the suburbs under more healthful conditions.[5] The five cent fare so usual here has also been considered important to the public. The recent advance in costs of all kinds has led the companies to demand, and many communities to concede, an increase in fares. This increase has in some cases taken the form of an addition to the flat rate, in others, of zone fares. In every instance the increases have greatly decreased travel, especially short hauls, by which the companies profit most. The result has been a curtailment of facilities, and a further increase of fare which the remaining passengers are forced to meet. Whether in time travel will adjust itself to the new rates, or be permanently lessened, to the great disadvantage of the community, it is too early to decide. It has been suggested that a low rate for a short trip in non rush hours would under present conditions benefit both the communities and the public; but no sufficient investigation of this possibility has ever been made. A low rate, short distance zone has also been suggested. Another device for securing regular additional traffic is the monthly ticket.

A method of fixing rates formerly suggested by public authorities as a means of lowering fares thought by them to be unjustly high, and of late urged by the companies as a means of raising fares now that, as they claim, they are un-

[5] It is claimed, however, in a recent article, "Zone Fares for Street Railways" by Walter Jackson in the *National Municipal Review* for November, 1920, p. 705, that a zone fare lessens congestion by tending to build up local centers. The writer very properly points out the fact that density of population is dependent upon many factors, of which methods of regulating street railway fares is only one. It should be noted in this connection that the zone fare is advocated by the street railway companies not as an improved method of charging the same fare as heretofore but as a means of increasing fares; and that whether necessary and just or not, such increases are sure to have many results besides the possible building up of local centers.

justly low, is called service at cost. By it the investment of the company is fixed at a given value and the company guaranteed in future the cost of the service and a given return on that value. Rates, therefore, would fluctuate from time to time as costs fluctuated, but dividends would remain fixed. Service at cost agreements are in many forms, with reserves to meet and equalize fluctuations in costs thought to be temporary and thus avoid frequent changes of the fare, with increased returns to the company as a bonus for good management, in some cases with dividends varying with the rate of fare, etc. The difficulties in making a contract and a valuation under it just to both parties, which shall ensure good service and at the same time economical and progressive management, are great. It should not be forgotten that in such contracts the capital becomes more or less a fixed basis for dividends guaranteed by the public against the contingencies that beset other enterprises; and that unless the public secures an equivalent advantage it should not enter into an agreement which may fetter it so seriously for many years to come.[6] Rates and service are so dependent upon conditions subject to change that, so far as other considerations permit, they should be left for regulation from time to time instead of being fixed by charter or long term contract.[7]

Granting Charter to Competing Corporation.—The granting of charters to competing corporations, when dissatisfied with the rates or services of those in existence is a crude and wasteful method of administering public utilities; for both the old and the new corporation must be allowed to earn a fair

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[6] See on the subject of service at cost the Report of the Federal Electric Railways Commission to the President, August, 1920; Government Printing Office, Washington, 1920; also "Flexible Fares or Service at Cost as Applied to the New York Transit Lines," a report of the City Club of New York, January, 1921.

[7] For further information the reader is referred to two pamphlets by Dr. Delos F. Wilcox, the first entitled "Solving the Traction Problem," being an address delivered at the New York State Conference of Mayors, June 12, 1919, and the second called "The Transit Problems of New York City," November, 1919, in which Dr. Wilcox had the advantage of the criticism of a group of representative men.

return on their investment,[8] and the public pays for the duplication, which usually is not so convenient to the public as a single system. The same evils result if the municipality itself constructs and operates the duplicate system or leases it to others to operate. The losses are, as a rule, disguised by the fact that they are paid out of general taxation, but they nevertheless still exist.

Public Ownership and Management.—If, finally, the city is not satisfied with its regulation of the semi-private corporation, it may wholly or partly assume its task. If the road is already built the city may, under its power of eminent domain, take the franchises and property, real and personal, of the transportation company, either itself running the road or leasing it under stringent operating conditions; or the city may itself build a competing road; or, if the road is not yet built, the city may itself in the first instance build it, constructing it as a public highway, assessing its cost against the land owners benefited, if desired, and operating it or leasing it for operation afterwards.

The Franchise of the Private Company.—In spite of the possibilities of the regulation of franchises already granted, the safest course is properly to limit and define the franchises, in the public interest, at the time they are given, and to secure to the authorities the right to regain these franchises on favorable terms.

There has been much time and study given to the determination of the elements of a model franchise. In discussing this subject we will still continue to take transportation as an example of utilities generally.[9]

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[8] The certificate of public convenience and necessity, usually required before a franchise will be granted, sometimes nowadays requires the new company to show that it can drive its competitor out of the field at a rate based upon a fair return on its own investment.

[9] See Delos F. Wilcox, *"Municipal Franchises,"* McGraw-Hill Book Co., New York Ciy, 1910 and 1911; the chapter on the same subject by the same author, in the *Digest of Short Ballot Charters,* by Gilbertson; A Model City Charter and Municipal Home Rule as prepared by the Committee on Municipal Program of the National Municipal League, final ed., March 15, 1916, p. 46; the Report of the Committee on Franchises of the National Municipal League, to the Conference at Toronto,

The street railway franchise, like most if not all public service franchises, if granted to a public service corporation at all, should be monopolistic. With proper regulations and limitations, this method insures the most effective system with the lowest rates. In so far as it is too late to adopt this policy, the joint use, with compensation, of tracks in the central parts of the city and at other strategic points should be secured, so that the growth of outlying systems, which to be useful and self-supporting must reach these parts of the city, may be obtained, and wasteful and inconvenient duplication of facilities be avoided. If competition must be allowed, transfers without charge, so far as possible, should be insisted on, so that in its travel the public may obtain to some extent the advantages of one system. All grants should be made, not necessarily for the same period, but rather, if granted at different times, to expire at the same date. In this way a better system may be planned and secured when the rights are regranted. No charge should be made to the companies for the rights granted them, nor any attempt made, by extraordinary taxation or otherwise, to obtain revenue from them; for the companies must reimburse themselves for such outlays. A better method is to require the companies to furnish adequate service at the lowest practicable rates. Public utilities are the life blood of the community, and it is better policy to obtain revenue from almost any other source.

The grant of the right to lay tracks in particular streets should be subject to the consent of a percentage of the abutters, but an appeal to the courts or a public service commission should be provided for, on whose certificate of public necessity and convenience permits to lay the tracks may be granted. In determining whether a fair rate of profit has been earned, extensions—which, at least in the beginning, are likely to be less profitable than the rest of the system—should not be considered separately, but as a part of the entire system.

November, 1913, in the Annals of the Academy of Political and Social Science, Vol. 57 of January, 1915, p. 8; a Supplement, issued April, 1920, of the National Municipal Review entitled "A Correct Policy toward the Street Railway Problem"; and generally the annals, the reports of the Proceedings of the League, and the Volumes of the National Municipal Review.

Example of New York City.—New York City in the construction of its subways furnishes an example of good and bad practice in bestowing franchises of this nature. In granting the rights for the construction of the original subway the city allowed the company to build a road up the east side of the narrow island of Manhattan, across it at 42nd Street, and up on the west side. This route was the most profitable route for the old company, but gave it the power to prevent the construction of any new system on reasonable terms either on the east or the west side of the city; and besides it stimulated growth in the most concentrated parts of the city and thus increased congestion. The old subway also confirmed the lines of growth in a northerly and southerly direction and narrowed instead of broadening the city.

In granting the franchises for the new subway these mistakes were in a measure avoided, but at great expense to the city on account of the power which its strategic position gave the old company. The new subways extend into the undeveloped suburbs of the city in nearly all directions, thus at last making New York a round city.

Another mistake made in the construction of the old subway was the failure to coördinate it with other necessary city planning measures. Transportation was advocated at that time as a sufficient cure in itself for the intense congestion of the lower east side. Without the proper regulation of future building, increased transportation facilities proved to be, as always, little more than a palliative. It did not relieve materially the overcrowding of the lower east side, and it built up a congestion almost as bad in the Bronx. In the new subway construction the city has done better. The city was not able to see its city problems as a whole, but at least, after its partial solution of the problem of transportation, it proceeded to pass its well-known zoning regulation of building, so that the city certainly will not lose the advantages of its increased transportation facilities to anything like the same extent that it did before.[10]

Recapture.—If the city wishes to adopt the policy of mu-

[10] For more on this subject, see p. 28.

nicipal ownership, the right of recapture of franchises becomes most important; and in any event it is a wise policy to secure this right as a protection against unsatisfactory private management of utilities and as a method of spurring the semi-private corporations administering them to good service. The right under eminent domain to take utility franchises and plant is an insufficient protection against inefficiency and excessive charges for many reasons, chief among which is the fact that the companies will claim that the franchise itself is property for which the city must pay a price which increases with the growth of the city.

There are many methods of securing to the city the right of recapture. The franchise may be granted for a fixed term, with the right to take it and the plant and equipment at a fixed price, or at a valuation made by some disinterested body; or the corporation may be required to surrender the franchise and plant to the city at the end of the term without further compensation. Little perhaps is gained by such a stipulation; for the public must in some form pay the corporation a reasonable return for its services, capital invested, and risks incurred; and the equipment, so necessary to the city's prosperity and well-being, is inevitably allowed to deteriorate more and more as the end of the period approaches. A better plan perhaps is to grant a franchise terminable at the option of the city at any time, or after the expiration of a very short period, with compensation at a fixed price or at a valuation. This is the method that is least likely, also, to deter the corporation from making necessary extensions.

The Water Front.—Cities situated on navigable water are privileged to have communication by water as well as by land. The use of the water for this purpose is dependent upon the ownership of land giving access to the water. For this reason the city's water front is unique.

The ownership of land bordering upon a non-navigable stream or body of still water carries with it ownership of the land under water to the center. If, however, the water is navigable, the law as to the ownership of the bank or shore, and the land under water, differs in the different states in this

country; in some the title being in the owner of the upland subject to the public right of navigation, in others that title being, to a greater or less extent, in the state. Almost universally, however, the owner of this upland has certain rights in this navigable water other than those belonging to the public. The most important of these rights is that of access, including the right to build wharves and piers for exclusive use, in such a way as not to interfere with public navigation, over the submerged land to deep water. In England, where there are no such large rivers and lakes as with us, only water where the tide ebbs and flows is legally held to be navigable; but with us the legal test is navigability in fact.[11]

Bulkhead Lines.—In planning a harbor it is necessary to fix the inter-relation of navigable water and the land approaches to it. This is done by fixing bulkhead lines, up to which ships may go and beyond which solid filling from the land into the water shall not be carried; and pier head lines, beyond which nothing shall extend from the land into the water. In planning a harbor and the city which it serves, it is often necessary to provide for the possibility of land transportation by bridges across navigable waters, thus obstructing them somewhat. In all civilized countries neither of these two things can be done without public authority.

The Noncommercial Water Front—Recapture.—The water front, indispensable for commerce, is of great use to a city for boulevards, parks, and beaches, giving health and pleasure to be obtained in no other way. Cities should realize that land on the water front is invaluable, and if any of it must be parted with, should make the transfer for a limited period, such as 25 or at most 50 years; with the right of recapture on reasonable terms within a much shorter period. The limitation of grants of land under water, like the limitation

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[11] In some states the owner of the upland has a preferred right to purchase tide lands from the state; 29 *Cyc. of Law and Procedure,* 358, and note 43. The state, in most jurisdictions, has no right without compensation to deprive the owner of the upland of access; Farnham, *Law of Waters,* Vol. 1, p. 302 and ff. The establishment of a bulkhead line as a rule confers upon the owner of the upland authority to fill to this line; Gould, *Law of Waters* (3d ed.) sec. 138.

of franchise grants, is a necessary part of the conservation of property essential to the public welfare. Any other course is a failure to guard a precious heritage for those who come after us.[12]

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[12] Under the charter of the City of New York (sec. 71) "The rights of the city in and to its water front, ferries, wharf property, land under water, public landings, wharves, docks, streets, avenues, parks, and all other public places are hereby declared to be inalienable." The legislature of the state, however, may pass statutes for the alienation of such rights; and the city may lease marginal property, and land under water for the limited periods (Charter, secs. 83-84).

In 1917, the Citizens Union of New York City introduced into the state legislature of that year a bill (Senate Introductory No. 907, Cromwell; Assembly Introductory No. 1264, Youker) requiring the state to make all future grants of land under water on condition that they may be retaken for any public purpose on repayment of "the consideration paid by the original grantee for the grant, together with an allowance for improvements." The Citizens Union, in their memorandum with regard to the bill, says:—

"The first instance of the use of a recapture clause in this state was in 1902, when the late Mayor of New York, Seth Low, prevailed upon the State Land Commission to insert it in all grants by the state. There were but two or three exceptions to this rule up to 1914. . . ."

This bill did not pass, but the State and City of New York still adhere to the practice of inserting a recapture clause in grants of land under water. See on this subject: New York State, Attorney General, *Grants of Land under Water* (J. B. Lyon Co., Albany, 1913); New York State, Report of Attorney General for 1920 (Legislative Document, 1921, No. 53; J. B. Lyon Co., Albany, 1921), pp. 303, 333, 349 ff.

The recapture clause inserted in grants of land under water by the City of New York (to be found on p. 338 of that report) is as follows:

"Upon the express condition that if the City of New York shall at any time hereafter acquire said premises and 'improvements,' or a part or portion thereof, by condemnation or otherwise, the liability of the City of New York shall be limited to the amount paid by said patentee to the State for this patent, or a proportionate part thereof, together with the expenses necessarily incurred by the patentee for the acquiring of this patent, which are hereby fixed at the sum of $350, and also the value of the 'improvements' on said premises, or the proportionate part thereof which may be so acquired. The value of such 'improvements' if all are so acquired, or such proportionate part of the amount paid by said patentee for this patent and of the value of such 'improvements' on a portion of such lands which may be so acquired by the City of New York, and all damages, if any, to the remainder of such 'improvements' which may not be so acquired, to be paid by the City of New York, may be determined in any proceeding brought by or on behalf of the City of New York for such acquisition."

CHAPTER V

STREETS—SETBACKS—TRAFFIC REGULATIONS

Streets.—The previous consideration of various details in the planning of a city, and the law applicable to these details, has involved the discussion of many legal problems relating to the construction of specific public features of the city. There still remain a few of these public features with relation to which the law requires further statement, the first of which to be so considered being streets.

The streets of a city are constructed with the double purpose of serving the general public and the abutter. The public is entitled to use them as avenues of communication. The abutter is entitled to obtain from the street, light, air, view and access for his property. The city cannot without compensation deprive him of these advantages, or diminish them, except to aid communication.[1]

Taking Easement Versus Taking Fee.—In street construction it was formerly the custom for the city to take merely the amount of interest in the land to be so used that was absolutely necessary for the purpose. This interest is an easement to use the land for street purposes. The law does not restrict the city in its taking to the limited right that is essential for street use. If for any reason it seems expedient, the city may be given the right to take full ownership or "fee"; for, as has already been pointed out, the manner and extent of the exercise of a power for a proper purpose is for the legislature in its

[1] McQuillin, *Munic. Corps.*, Vol. III, p. 2848; see also Elliott on *Roads and Streets*, sec. 26, notes 36, 39. In some jurisdictions, where the abutter does not own the fee, such deprivation is not a taking of property for which he has a constitutional right to recover, but only a damage for which he is repaid if there are statutes in his jurisdiction giving him that right; see Nichols, *Eminent Domain*, 2d ed., sec. 115.

wisdom to determine.[2] It is now more customary than heretofore to give the city the power to take the entire title or "fee" to lands needed for streets, and for cities to exercise this full power. Experience proves the wisdom of such a course. There are cases in which the taking of easements is an economy: but as a rule the full title costs the city little more than the limited right, and is much more valuable to it. Owning the fee, the city can always allow the abutting property owner to use the property to such an extent as may be expedient and resume its full rights at any time without cost to it.

Effect on Abutters' Rights.—The statutes and decisions of the various states are not in harmony as to the differences resulting from the taking of an easement, as distinguished from a fee, in the land wanted for streets. Where the city owns the fee it is settled that the abutter may not occupy any part of the surface, sub-surface or super-surface of the street except with the city's permission and on payment of any charge that the city may make; whereas if the city has taken only an easement for street use, the remaining uses belong to the abutter, and the city cannot exclude him from them or require him to pay for enjoying them. Thus if the city owns the fee, and an abutter wishes to build a vault under a part of the sidewalk, he can do so only with the city's consent, revocable at any time, paying for the privilege whatever the city may charge. If, however, the city owns only an easement, the sole question is whether the space desired by the abutter is needed for sewers, water pipes, or some other street use. If not, the space belongs to the abutter, and he has the right to use it without payment to the city.[3]

With this exception the better opinion is that there is no practical difference in the two cases in the relative rights of the abutters and the city. In either case the city and its citizens may employ the street,—surface, sub-surface and super-surface,—for any legitimate street purpose; in either case, the abutter is entitled to access, light, air and view from the street. Thus the public may avail itself of the street for the passage of

[2] See p. 21.
[3] McQuillin, *Municipal Corporations*, Vol. III, pp. 2848, 2898.

persons and vehicles with goods, but not for sandwich men and vehicles covered with advertisements; the abutter, where it does not unduly interfere with the use of the sidewalk by passersby, may unload boxes across it, but may not store boxes on it. It is customary, however, in parts of many cities to allow the abutter to occupy the city's land beyond the street line, on, over or under the surface, for steps, porticos, vaults, bridges and other private purposes until such time as the city itself needs the land. Sometimes the city actually draws encroachment lines beyond which the abutter may not go. The city does not lose its right to take this land by lapse of time as a private owner would do; and if neither the city nor the abutter is allowed to forget the actual state of affairs, there is no reason why this advantage, which costs the city nothing, should not under a revocable license be allowed the land owner.

Removal of Encroachments.—When, however, traffic increases, there is no relief so quick and effective as the removal of encroachments and the widening of the driveway by adding to it a portion of the sidewalk. Expensive as this is sure to be to the abutter, he should not regard it as a hardship; for he has accepted the use of a portion of the city land free of charge on the chance that it would be worth more than the subsequent reconstruction would cost him, and must accept the results of his speculation; in which as a rule he is not a loser. He also gains by the widening of the roadway, which makes his land more serviceable to him and raises its value. Mr. McAneny, under whose administration as President of the Borough of Manhattan in the City of New York encroachments were in many cases removed and the capacity of streets to accommodate the traffic thus increased, incurred at first much enmity by pursuing this policy; but soon the advantages of thus virtually widening the streets were admitted even by the owners whose encroachments were removed. Perhaps no act in Mr. McAneny's public life proved in the end more popular.

Street Use.—Under the decisions of the courts street use includes the transmission of messages, the passage of gas, water, electricity, etc., with the poles, wires, pipes, conduits and other appliances necessary for these purposes; for this is a use

of the streets for communication, and the streets are intended to be avenues of communication. In practice the streets are utilized for newsstands, and many other private businesses which are not aids to communication. To what extent such an employment of this public space is legal is still uncertain. There seems to be a tendency, at least to tolerate as a street use any use which has become customary and is generally regarded as a convenience to the public. These and all street uses and the methods of accomplishing them necessarily change with time and custom and public needs.

Use of Streets by Transportation Companies.—The most important and difficult questions with regard to street uses arose in reference to the utilization of streets by transportation companies. It was early held that the employment of horse cars with tracks in the surface of the streets by a semi-private corporation to transport local passengers through the streets, was as much a street use as the passage of persons on foot or in private vehicles; and that, therefore, the abutter was not entitled to damages from such a transportation company. This decision was due not only to the fact that such a use was customary and proper, but also to the fact that cars drawn by horses on the surface of the street did not appreciably increase the burden cast upon the abutter. Gradually, with changing methods of transportation, the abutter's rights and privileges have been encroached upon. The courts in the different states still differ in their distinction between what is and what is not a street use for which a corporation must pay abutters damages. The tendency of the legal decisions is to draw the line as follows:—Corporations may, without payment to abutters, transport local passengers by any motor power at grade; if, however, they employ subways or elevated structures, or carry freight or other than local passengers, they are liable to abutters. It is difficult to see why the latter uses are not logically as strictly street uses as the former. Apparently the decisions in this particular line of cases have come to turn rather on the actual burden cast upon the abutter than upon the question whether the use is a legitimate street use.

Setbacks.—A setback or front building line[4] is a line behind the street line beyond which on his own land the abutter must not erect buildings, the land owner retaining the right to use his land for all other purposes. The establishment of such a line is therefore the taking by the city of an easement under the right of eminent domain in the land abutting on the street in question, the city paying not the value of the land, but merely the value of the easement.[5] This easement varies with the statute and the ordinance drawn under it by which the line is fixed. Under some ordinances nothing can be built beyond this line; under others, where perhaps lawns are deep, porches, piazzas, etc., are allowed to project for a certain distance, a subsidiary porch and piazza line being drawn. As a rule, to save expense, buildings in advance of the building line at the time it comes into existence are allowed to remain, but not to be renewed or substantially repaired;[6] and, to avoid too great

[4] The building line or setback has been resorted to in this country for many years; and statutes authorizing its use will often be found in the private laws of the various states, and the charters of their cities. In Connecticut, for instance, the establishment of a building line was authorized in Hartford in 1799; in New Haven in 1826, Bridgeport and Norwich, 1836. The provisions will be found in the private laws of the state, Vol. 1. For many more or less similar acts, see the private laws for 1859, 1897, 1911, 1913, 1915, 1917. The subject is now regulated in Connecticut by general laws; Gen. Stats. 1918, sec. 392 ff., 519 ff. For the laws in the various states on this subject see Tables of Statutes.

[5] Perhaps, however, by zoning, setbacks may be established under the police power without compensation; for the law on this subject see p. 279. It should be noted also that in Pennsylvania (as on the Continent of Europe; see p. 177) as a result of the practice, sustained by the courts of that state (see p. 31) a building line may be established in street widenings without compensation to the owner of the land and buildings, except for the land at the time it is taken; the owner being meanwhile forbidden to renew or substantially repair the buildings. For examples of such procedure see among many others ordinances of Philadelphia for the widening on the city plan of Chestnut Street, approved March 31, 1884, June 23, 1888, and June 30, 1892. See also the recent Pennsylvania statutes—1921, Nos. 62 and 295 on the subject, given on p. 587 of this work. In this connection the ordinances for arcading 15th and South Penn. Square streets in Philadelphia by the same method, approved on June 9, 1900, may be of interest. See also "Street Widening to Meet Traffic Demands" by Nelson P. Lewis, in the Proceedings of the 9th National Conference on City Planning (1917), p. 43.

[6] Massachusetts originally passed its building line statute (Acts 1893, ch. 462) without this provision; and little use was made of this power until it was amended as here suggested. For the statute in the present form, see p. 184 of this work.

irregularity in the frontage of the buildings and too long delay in completing the improvement, the city often condemns the remaining buildings or parts of buildings in advance of the line when in course of time they have become few or of little value.

Uses of Setbacks.—The setback may be employed with advantage as a feature in the construction and use of three classes of streets:—suburban and minor residential streets, suburban business and traffic streets and business and traffic streets in the more central parts of cities. The problems that arise in these three situations will here be treated separately.

Suburban and Minor Residential Streets.—In small communities outside the business center, and in the suburbs of larger communities, a desirable and profitable form of development of land on smaller and side streets is that of houses with lawns in front; and districts so developed will often be found in such neighborhoods. Such districts are sometimes the result of the establishment of a setback by private covenants in deeds inserted by the owner of a large tract, or of tacit agreement by many individual builders of homes. Where the location of the district is wisely chosen, appropriate restrictions of this sort raise land values, because they make a neighborhood more quiet, pleasant and healthful for residence. Such districts, also, decrease the congestion and increase the light and air of the community as a whole. In most cases, therefore, there is no reason, economic or social, why the character of the district should not remain unchanged for many years.

Private covenants, however, expire, and tacit agreements may be violated with impunity by any land owner. In order, therefore, to preserve the district in the interest of the owners and the city it is often necessary to provide for public setbacks. Nor is the utility of the publicly created building line limited to these districts. There may be other districts which should be improved in this way; but, except where the land owners are few in number, it is seldom possible to get them all to agree; and without such an agreement it is impossible to establish the restriction, unless sanctioned and enforced by the public authorities.

Suburban Business and Traffic Streets.—A characteristic of the age in which we live is the growth of cities, both in population and in business and industry in proportion to population. This growth seems invariably to occasion a more intensive employment of land, due, in any given locality, either to an increase in the same use or to a shift to a more intensive use. In either case an added burden is thrown upon the streets, the main business thoroughfares receiving most of it. This occurs both in the central and in the more outlying parts of cities, and, in both cases, often makes it desirable to provide for the adaptation of the streets to the change of conditions likely, with time, to occur. The problem is by no means the same one in city suburbs and city centers. In the centers the streets have long been built, and it is no longer possible to choose a flexible form of street construction; nor can changes in the streets be made without great expense. In the suburbs, however, there are still streets to be laid out, and the streets that already exist are not so intensively improved. These problems should therefore be considered separately, and it is the suburban problem that will be now taken up.

In laying out a new street which may become important for business or traffic two courses are open to the city, by either of which the future widening of the street may be provided for. The city may at once take land of a width adequate for future needs and allow the abutters to use strips on each side for narrow lawns, or it may lay out the street just broad enough for present uses and impose a setback on the abutters, so that when the street is widened it will not be necessary to pay for buildings. Either course avoids the waste of maintaining a paved roadway of needless width, gives the abutters the advantage of strips of green as long as possible, and avoids useless destruction of buildings. The wisest course for the city to pursue is perhaps to take the entire width if the authorities have good grounds for thinking that it will be needed within a reasonable time and there is money in the treasury for the purpose; but otherwise to be satisfied with the narrower street and a building line.

The advantages of imposing a setback on land abutting on

streets of this character after they have been constructed, when this is still reasonably possible, are admirably stated in a pamphlet issued by the Committee on City Plan of the City of New York.[7] The committee points out the "practical impossibility" of changing the lines of a street improved to its very edge, whatever the increase of the burden is that is cast upon it. This obstacle is avoided by the use of the building line before such an intensive development occurs.

"The existence of the set-back line" the authors say, "will permit the economical widening of traffic arteries whenever traffic needs require. It introduces a measure of adaptation and elasticity in street design that is of immense importance in view of the almost prohibitive expense of widening a street once laid out and improved.

"The fixing of the set-back line *now* is the only practical method by which the widening of many traffic arteries can be secured in the future when greater width will assuredly be required. These arteries are now residence streets and the houses have been set back in order to provide lawn and shade and to remove them from dust, fumes and noise of the street. They cannot be widened at present, as the cutting off of the front lawns would in large measure destroy the value of the dwellings. When, however, traffic has so increased that the street must be widened it is more than likely that the street will be no longer desirable for private residence purposes, and the private dwellings will be replaced either by apartments or by business buildings. The set-back line can therefore be established when the future traffic thoroughfare is still a residence street, with advantage to all owners, and when the time comes to widen the street to meet traffic needs the set back can be taken for street purposes and this, too, will be to the advantage of the owners. By thus imposing the set-back line and then widening the street at the very time that these things can be done with greatest advantage, both to the owners and the City, the traffic artery can be secured at a minimum expense."

The extract just quoted not only states the advantages derived from the flexibility obtained by the use of the front building line but also illustrates the usefulness of the building line in securing an orderly shifting from one development to another. When the residential street, with houses set back from it, changes to a street of apartment houses or stores, these

[7] "Establishment of Setbacks or Court Yards in the City of New York," issued in 1917 in advocacy of a city bill, since passed by the legislature (1917, ch. 631) giving the city power to establish such lines. The statute is given in full on page 185 of this work.

buildings in all probability will advance to the very edge of the paved sidewalk. Such changes usually cannot and should not be opposed; for the higher land values generally indicate that the new use is of greater importance to the community; but the change should not be made at the whim of one or two shortsighted or selfish land owners, who by building to the sidewalk force an immediate and general change against the interests of the street as a whole, and temporarily impair land values for the entire street. With a setback established, such a change is impossible until the city, in the general interest or the interest of the majority of the property owners on the street, removes the restriction and authorizes the change of use.

On such a street there is often a special need of a setback at street corners. As communities grow and traffic increases, corners are the first to develop to the very street line. This situation in this age of rapidly moving automobile traffic invites collisions. In such cases, no doubt, the city can well afford to pay for the right it takes to maintain a view around corners in the interest of traffic movement.

Central Business and Traffic Streets.—The widening of streets in city centers, intensively improved with buildings on each side to the street line, is sometimes imperative. The expense in such cases is very great, and is due much more to the value of the buildings that must be demolished than to the cost, large as it is, of the land that must be taken. In such improvements much may be saved by establishing a building line back of the street line and of the fronts of the buildings, under the provisions of which buildings, in so far as they are in advance of this line, shall not be renewed or substantially repaired. In this way the city is not forced to take the buildings until they are of comparatively little value. Such a street widening is slow, but the great saving effected makes many improvements possible that otherwise would not be undertaken.

Economy of Setback.—In the accomplishment of all three of the purposes set forth above the use of the setback is an economy. In districts where front lawns are appropriate the

line, if established seasonably, is altogether for the advantage of the property owners and may be fixed without expense to them or the city; for the theoretical damage to the land owner due to the restriction placed on his property is at least equalled by the benefit to him of the restrictions imposed upon his neighbors. As an adjunct to suburban business and traffic streets the setback is economical because it saves future waste and expense and interferes little with present uses, or even promotes them.

These two uses of the front building line are by far the most essential and the most usual. Of their financial results in Brookline, Massachusetts, the report of the planning board for 1915 says:—

"The statement designated 'Appendix D' is of interest as indicating in a general way the extent to which the building line has been used in Brookline since its acceptance in 1896. Between 1898 and January 1st, 1916, the law has been applied to twenty-one streets and a total frontage of 33,303.63 lineal feet. The set-back varies from five to twenty feet and has an average of 10.3 feet. On thirteen streets no award has been made or only a nominal award. An easement for building lines has been taken from one hundred and eight property owners and of this number ninety received either no award or merely a nominal award for damages. The total cost to the town of building lines on the twenty-one streets has been $1,687.00. The total area restricted has been 315,907.9 square feet, making the average cost to the town for building restriction for all building lines about one-half cent per square foot. There is but one outstanding suit for damages for establishment of building lines and no suit for such damages has ever been brought to trial."

It remains to consider the cost of the setback as a method of increasing the width of intensively developed streets. The claim cannot be made for it that it accomplishes the desired result at a small expense, for this cannot be brought about by any method. It does lessen the outlay more than can be done in any other way, and this is all that can be hoped for. By its use many of the heaviest items of expenditure are eliminated, and all the rest remain the same or are not greatly increased.

Setback lines may be established by the procedure employed for laying out streets, any costs being assessed against the

abutters in proportion to their benefits, as in street openings.[8] If this is done there will be few cases in which a proper building line, except where it is used to widen intensively developed streets, is of any expense to the city as a whole. The financial results to the town of Brookline, just quoted, are all the more remarkable because such assessments are not provided for under the Massachusetts law. The setbacks, like streets and other public features, should be a part of the city map.

The constitutionality of setback statutes to be established under the power of eminent domain cannot be questioned. The interest in the extra land is condemned for a street use; the legislature has decided to take an easement in land for these purposes instead of the entire title; and the wisdom of this decision cannot be challenged by the courts, for it is a question for the legislature alone to decide. Such legislation is common abroad, has existed and has been used for many years in several of our states and has received the approval of our courts.

Traffic Regulation.—In the exercise of its police power the city, in order to facilitate traffic, has the right to impose regulations upon abutters and the general public in their use of sidewalks and roadway. Those regulations are of many sorts, such as limiting the hours during which abutters in crowded parts of the city may load and unload goods across the sidewalk, forbidding vehicles to stand longer than a certain time at certain places and requiring vehicles to obey certain directions of police stationed at congested corners. Special streets are often subject to special rules. Thus in some cities traffic in certain narrow streets called "one way streets" is allowed to go only in one direction; and on some boulevards only pleasure vehicles are permitted. Traffic regulations are likely to become more specific as congestion in cities increases. For instance, streets are laid out of a given width to accommodate a given number—two, three, four or more—of streams of vehicles with space for a standing vehicle at one or both curbs. A vehicle appreciably wider than the average taken as

[8] For references to building line statutes, under which in most cases the costs are paid by local assessment, see p. 184, ff.

the basis of this calculation entirely spoils this nice adjustment. As streets where buildings and land are perhaps too expensive to condemn for street widening approach their capacity, more and more careful traffic regulation may be the only relief from intolerable congestion.

Note C

Setback or Building Line Statutes in the United States

No. 1. Massachusetts[9]

Building lines.

If a city by its city council or a town accepts this section or has accepted corresponding provisions of earlier laws, a building line not more than 40 feet distant from the exterior line of a highway or town way may be established in the manner provided for laying out ways, and thereafter no structures shall be erected or maintained between such building line and such way, except steps, windows, porticos and other usual projections appurtenant to the front wall of a building to the extent prescribed in the vote establishing such building line, and except that buildings or parts of buildings, embankments, steps, walls, fences and gates existing at the time of the establishment of the building line may be permitted to remain and to be maintained to such extent and under such conditions as may be prescribed in the vote establishing such building line. Whoever sustains damage thereby may recover the same under chapter seventy-nine [eminent domain]. A building line established under this section may be discontinued in the manner provided for the discontinuance of a highway or town way. Whoever sustains damage by the discontinuance of a building line may recover the same under chapter seventy-nine.

Damages.

No. 2. Indiana[10]

Such board [of park commissioners of first or second class cities] may establish a line determining the distance at which all structures to be erected upon any premises fronting any park, parkway, park boulevard or boulevard shall be erected; and may, in the name of the city, acquire by condemnation the right to prevent the erection of,

[9] This statute was first passed in 1893 (ch. 462) authorizing a setback of not more than twenty-five feet. Under this law there was no provision, as in the present law, for allowing existing buildings to remain, and it was little used. The law here given is Gen. Laws 1920, ch. 82, sec. 37. For similar provisions with regard to towns with boards of survey, see Gen. Laws, 1920, ch. 41, sec. 80.

[10] Acts 1911, p. 566, part of sec. 7; Burns' *Annot. Ind. Statutes,* 1914, sec. 8753.

and to require the removal of, all structures outside of such lines; and when so condemned, no permit shall be issued authorizing any structure outside of the line or lines so established; and no such permit issued by any department or officer of any such city shall be effective and valid, unless approved by the board of park commissioners of such city. The establishing of any building line outside of any park, parkway, or boulevard, as herein provided, in connection with the condemnation of the land for the same, shall be understood to be condemnation and the perpetual annihilation of all rights of the owners of property which shall front on such park, parkway or boulevard, or across which such building line shall run, to erect any building or structure whatever or any part thereof between such building line and such boulevard, park or parkway; or such result may be accomplished by absolute condemnation of the land, with perpetual and irrevocable free license to use and occupy such land between any building line established and the outside line of such park, parkway, park boulevard or boulevard for all purposes except the erection of buildings or other structures. No subdivision into lots of any lands lying within five hundred feet of such boulevards, parks or parkways shall be valid without the approval of such board of park commissioners; . . .

No. 3. New York [11]

The City May Acquire Real Property for Streets, Parks, Etc.

New York City Charter, Sec. 970. The city of New York may acquire title either in fee or to an easement, as may be determined by the board of estimate and apportionment, for the use of the public, to all or any of the real property required for streets *and courtyards abutting streets, and for* parks, parkways, playgrounds, approaches to bridges and tunnels and sites or lands above or under water for bridges and tunnels, and sites or lands above or under water, for all improvements of the navigation of waters within or separating portions of the city of New York, or for the improvement of the water fronts of the city of New York, or part or parts thereof, heretofore duly laid out upon the map or plan of the city of New York, of the city of Brooklyn, or Long Island City, or of any of the territory consolidated with the corporation heretofore known as the mayor, aldermen and commonalty of the city of New York, or here-

[11] The provision with regard to setbacks (here called "courtyards abutting streets") was made by the statutes of the State of New York of 1917, ch. 631, as an amendment to the sections of the charter for the acquisition of land for streets, parks, etc., and is phrased with a fullness of detail characteristic of legislation in that state. The amendment is here distinguished from the former law by being placed in *italics.*

after duly laid out upon the map or plan of the city of New York, as herein constituted, and cause the same to be opened, or acquire title as above stated to such interests in real property as will promote public utility, comfort, health, enjoyment, or adornment, the acquisition of which is not elsewhere provided for. The board of estimate and apportionment may specify what use is required of the real property which it may determine shall be acquired for public use, and the extent of such use, and may direct the same to be acquired whenever and as often as it shall deem it for the public interest so to do. The real property required for such purposes may be taken therefor, and compensation and recompense shall be made to the owners thereof. The real property benefited by the improvement may be assessed for the benefit and advantage derived therefrom. In all proceedings authorized by the board of estimate and apportionment prior to the first day of January, nineteen hundred and seventeen, the said board shall determine whether the compensation to be made to the owners of the real property to be acquired shall be ascertained by the supreme court without a jury, or by three commissioners of estimate to be appointed by the said court. In proceedings in which the board of estimate and apportionment shall determine that the compensation to be made to the owners of the real property to be acquired shall be ascertained by the supreme court without a jury, the city of New York shall make application, or cause application to be made to the said court, in a county within the city of New York and within the judicial district in which the real property to be acquired is situated, to have the compensation, which should justly be made to the respective owners of the real property proposed to be taken, ascertained and determined by the said court without a jury, and to have the cost of the improvement, or such portion thereof as the board of estimate and apportionment shall direct, assessed by the court upon such real property as the board of estimate and apportionment may deem to be benefited thereby. In proceedings in which the board of estimate and apportionment shall determine that the compensation, which should justly be made to the owners of the real property proposed to be taken, shall be ascertained by three commissioners of estimate to be appointed by the said court, the city of New York shall make application, or cause application to be made to the said court in a county within the city of New York and within the judicial district in which the real property to be acquired is situated, for the appointments of three commissioners of estimate to ascertain and determine the compensation to be made to the owners of the real property proposed to be acquired, and in a proper case, for the appointment of one of the commissioners of estimate as a commissioner of assessment for the purpose of levying the assessment of the cost of the improvement, or such portion thereof as the board of estimate and apportionment may direct to be assessed upon such real property as

may be deemed by the said board of estimate and apportionment to be benefited thereby. The board of estimate and apportionment may authorize two or more streets to be included in one proceeding. The moneys collected upon the assessment for benefit shall be paid into the city treasury. The damages awarded as compensation shall become due and payable immediately upon the entry of the final decree of the court, or upon the entry of the order confirming the report of the commissioners of estimate, as the case may be. In proceedings authorized by the board of estimate and apportionment after the first day of January, nineteen hundred and seventeen, the compensation to which the owners of the real property to be acquired for the use of the public for the purposes specified in this section, shall be ascertained and determined by the supreme court without a jury in the manner and according to the procedure prescribed by this title, and on and after said date the city of New York shall make application to the court, or cause application to be made to the supreme court in a county within the city of New York and within the judicial district in which the real property to be acquired is situated, to have the compensation, which should justly be made to the respective owners of the real property proposed to be acquired, ascertained and determined by the said court without a jury, and to have the cost of the improvement, or such portion thereof as the board of estimate and apportionment shall direct, assessed by the court upon the real property deemed by the board of estimate and apportionment to be benefited thereby."

Vesting of Title in the City to Real Property Taken for Streets or Parks or Other Purposes

Sec. 976. Should the board of estimate and apportionment at any time deem it for the public interest that the title to the real property required for any improvement, authorized herein, should be acquired by the city of New York at a fixed or specified time, the said board of estimate and apportionment may direct, by a three-fourths vote, that upon the date of the entry of the order granting the application to condemn or upon the date of the filing of the oaths of the commissioners of estimate, as the case may be, as provided for in this title, or upon a specified date after either, the title to any piece or parcel of real property lying within the lines of any improvement herein authorized, shall be vested in the city of New York. Upon the date of the entry of the order granting the application to condemn, or upon the date of the filing of such oaths, as the case may be, or upon such subsequent date as may be specified by said board, the city of New York shall become and be seized in fee of, or of the easement, in, over, upon or under, the said real property described in the said resolution, as the board of estimate and apportionment

may determine, the same to be held, appropriated, converted and used to and for such purpose accordingly. In such cases interest at the legal rate upon the sum or sums to which the owners are justly entitled upon the date of the vesting of title in the city of New York, as aforesaid, from said date to the date of the final decree of the court or to the date of the report of the commissioners of estimate, as the case may be, shall be awarded by the court or by the commissioners, as the case may be, as part of the compensation to which such owners are entitled. In all other cases, title as aforesaid shall vest in the city of New York upon the filing of the final decree of the court or upon the entry of the order confirming the report of the commissioners of estimate, as the case may be, and the reversal on appeal of the final decree of the court or of the order of confirmation, as the case may be, shall not divest the city of title to the real property affected by the appeal. Upon the vesting of title the city of New York, or any person or persons acting under its authority, may immediately, or any time thereafter, take possession of the real property so vested in the city, or any part or parts thereof, without any suit or proceeding at law for that purpose. The title acquired by the city of New York to real property required for a street shall be in trust, that the same be appropriated and kept open for, or as part of a public street, forever, in like manner as the other streets in the city are and of right ought to be. *The board of estimate and apportionment may, at the time of the adoption of the resolution instituting the proceeding in which lands are to be acquired for courtyard purposes, determine whether the fee or an easement shall be acquired in lands required for courtyards, and it may prescribe such conditions and limitations on the title so to be acquired and as to the temporary or permanent use of the land so to be acquired as it may deem proper, and the title which the city shall acquire to the lands required for courtyard purposes shall be such as the board of estimate and apportionment shall determine, and such title shall be held by the city subject to such limitations and conditions as to title thereto or as to the use thereof as the board of estimate and apportionment shall prescribe. If not inconsistent with such limitations and conditions as to title or as to use, land acquired for courtyard purposes may be devoted to general street uses whenever the board of estimate and apportionment shall determine that the public interest requires such use.* If any individual or corporation before the entry of the order granting the application to condemn or before the appointment of the commissioners of estimate, as the case may be, has acquired by private grant, prescription or otherwise, any easement for the purpose of laying or maintaining in the real property to be acquired for street purposes as herein provided, underground pipes or conduits for the distribution of water, gas, steam or electricity, or for pneumatic service, such easement shall not be extinguished, but the title to

the real property so to be acquired for the purposes herein provided for shall be taken subject to such easement; provided, however, that nothing herein contained shall be so construed as to limit the power of the city of New York to acquire by purchase or by condemnation proceedings the entire plant or service of such individual or corporation, or to acquire such easement in such street in any other appropriate proceedings. The title in fee acquired by the city of New York to real property required for all purposes provided for in this title, except street *and courtyard* purposes, shall be a fee simple absolute.

PART IV

PLANNING THE PRIVATE FEATURES

CHAPTER I

THE PRINCIPLE OF BUILDING REGULATION AND ZONING

Building Regulation.—Building regulation may be roughly divided into three classes: Structural requirements, regulation of the bulk of buildings and other structures, and regulation of the uses for which they may be erected, or to which, when already in existence, they may be put in various parts of a locality. In connection with the regulation of the use of structures on land may conveniently be considered analogous uses of land without structures on it, as, for instance, for the conduct of the junk or lumber business or for the parking of taxicabs for immediate call. The expression "structural requirements" here used, means those other than of bulk.

Building regulations may be the same for all structures, or all of the same class, throughout the entire city or other administrative unit, or they may vary in the various parts of that unit. In the latter case they are called zone regulations. Use regulations, however, being intended to confine buildings employed for certain purposes to certain parts of a city, are necessarily zoning regulations.[1]

Retroactive Regulations.—Building regulations are not as a rule so drawn as to be retroactive.[2] Existing buildings

[1] Regulations with regard to the construction of buildings of a certain class, throughout the city, for a given use, do not vary the character of the different sections of the city one from the other and are not in this connection classified as use, but as structural regulations.

[2] The zone regulations of Los Angeles are a notable exception; see p. 267.

and existing uses in them are rarely disturbed. At long intervals, as standards advance, minimum requirements for the occupancy of dwellings may be increased somewhat, and the employment of some of the worst apartments for living purposes forbidden until they have been altered to conform to the new regulations. For the most part, however, it is the bulk of future structures in different sections of the city (including additions to and alterations of present or future erections) and the uses to which existing structures shall be put and future structures devoted, that is regulated. The main purpose and effect of such regulations, therefore, is to prevent the beginning, aggravation and spread of undesirable conditions, not to cure them when already in existence.[3]

Structural Regulations.—Building operations in a modern city are almost invariably governed by regulations enacted for the purpose of guarding against flimsy construction, securing sanitation, etc. These regulations are usually contained in a building code, so called, and constitute the bulk of it. With these rules, in so far as their tendency is to secure these results, this inquiry cannot deal; for to do so would only lead too far afield and involve detailed discussion of matters technical in their nature and better treated in other connections. Often, however, structural provisions do affect materially the city plan, and sometimes are passed for the purpose. A favorite means in many communities of excluding the "three decker" (i. e., the three story tenement house, with an apartment to the floor, often covering an undue percentage of the lot) is to make the requirements for it so expensive that it cannot be built at a profit. The New York City tenement house law, passed in 1901, provided that all tenements over six stories in height should be fire proof, and later amendments have made the six story building proportionately more expensive than the five story structure.[4] Chicago has for many years required all

[3] See, however, p. 200 with regard to non-conforming bulks and uses and their treatment.

[4] Originally Laws 1901, ch. 334, sec. 11; now Tenement House Law, Laws 1909, ch. 99, sec. 15, renumbered by Laws 1913, ch. 551, sec. 2, to be sec. 14. See also same, sec. 24, Laws 1909, ch. 99, as amended, Laws 1913, ch. 551 and Laws 1919, ch. 648.

tenements over three stories to be of fire proof material.[5] The result is that in Manhattan and other parts of the city, New York is prevailingly a city of six or five story residences, while in Chicago the three story type is the predominant one. At the time these fire proofing regulations were passed, a plain height limit prescribing such a maximum would have been difficult of enactment.

Bulk Regulations.—The principal purpose of bulk regulations [6] is to guard against undue concentration. In form they are rules fixing maxima which structures shall not exceed. A measure of concentration in these communities is, on the whole, desirable. A city is the result of the division of labor, one of the consequences of which is the specialized use of land. Specialization is utilization to the greatest advantage. In the country the raw material is produced and extracted; in the city it is manufactured and exchanged. Manufacture and exchange require more frequent and quicker contacts than production and extraction; and therefore city land is employed more intensively and is more productive and valuable.

But the tendency of concentration is to increase. More intensive use augments the return from a given area of land; this adds to its value; and in the endeavor to obtain a return proportionate to this greater value the use is made still more intensive, and so on in the vicious circle. Thus undue concentration becomes congestion, clogging movement instead of facilitating it, to the injury not only of business and industry but of living conditions as well. The public and semi-public features of a city—its streets, transit facilities, sewers, parks, etc.—are of necessity planned and constructed for a certain intensity of use. It is mainly the bulk of the structures of the city that are privately owned and used—the houses where the people live and the stores and factories where they work—that determines the amount of use to which these public facilities are subjected. If these public features—except as a necessary

[5] The provision is now to be found in the Chicago Code, Callaghan and Co., Chicago, 1911, sec. 450.

[6] For a recent article on height regulation, see "Restrictions Governing City Development" in the (English) *Town Planning Review* for July, 1921.

provision for the city's growth—are made bigger than is needed for the use to which they are put, there is a waste of equipment. Of this the unnecessarily broad street, paved at great expense to its entire breadth, is a glaring example. If, however, by the unrestricted increase in the bulk of buildings and the resulting growth in traffic these public and semi-public features are allowed to become inadequate, there is dislocation, confusion, constriction and the heavy losses they necessarily entail. The hopeless congestion of people and traffic in lower New York City and in the Loop in Chicago, and the condition of those who must work there, are only extreme illustrations of what exists in many of our cities. It has been calculated that, even if all traffic were removed, many of the streets and sidewalks of lower New York would hold only from 96.3 to 37.5 per cent of the occupants of its buildings,[7] and that to take the inmates of one of them to their homes alone taxes the subway to its capacity for half an hour. In some of these streets the light is so obstructed by tall buildings that artificial light is necessary even in the space nearest the window, for most of the frontage, on a sunny day in midsummer. Except in rare instances the public features of a city, once planned and constructed, cannot be greatly augmented—the expense is prohibitive—and to keep pace with the demands of unrestrained private growth is manifestly impossible.

Nor is the balance between private buildings and public features the only one that must be maintained by restricting the mass of private structures. Every building—whether a residence, a store or a factory—in which human beings remain for any considerable time, requires a certain amount of open space appurtenant to it, to furnish access of light and air. Direct sun light is also most valuable. This need the public street supplies only partially, the supply from this source becoming more and more inadequate as the city grows. The bulk

[7] For the facts mentioned in this chapter showing the evils resulting from the lack of regulation, see generally the Report of the Heights of Building Commission, New York City, December 23, 1913, and the Final Report of the Commission on Building Districts and Restrictions, New York City, June 2, 1916. Similar facts may be found in most of the many reports of cities in this country on zoning since 1916.

of buildings must, therefore, be regulated with relation to the lots on which they stand or an increase in fire hazard, anæmia, disease, accidents—especially to children playing in the streets —and juvenile delinquency, inevitably follows.

The tendency of decreased usefulness is to lessen values in land, as in other commodities. This is seen in the deterioration of certain neighborhoods, and the growth of slums in others, as congestion increases. This effect, however, is not necessarily felt by the land owner in many parts of central city areas. The reason for this is partly that other causes are usually at work tending to add to these values and congestion only retards this increase; partly that the land owner, under our system, shifts the loss to the city as a whole, which pays it in augmented expenses, costly improvements such as street widenings, the relocation and enlargement of sewers and the increase and extension of all the public utilities. High land values, too, in a congested city are confined to a small section, to the loss of land owners generally.

The Tall Building.—To the larger cities of this country [8] the tall building, since the invention of steel construction has made it possible, has become a peril. This is especially true of the very large city.

Almost universally the tall building must be fire proof and have special fire fighting apparatus to lift water beyond the effective reach of the regular system. Nevertheless these buildings present special fire perils. The rooms in them are usually filled with highly inflammable material; the elevator wells serve as vast flues to draw the fire upward; the difficulty of reaching the ground in case of panic is great; often the streets would be too small to hold the number of people who would be forced to escape from the buildings.

In a district of tall buildings there is sure to be an insuffi-

[8] And in Canada: Witness, Thomas Adams, Town Planning Adviser, Canadian Commission of Conservation, who says (in *The American City*, July, 1918, p. 3):

"In our Canadian cities the sky-scraper is the stepbrother to the vacant lot; only that for every sky-scraper there are probably a hundred or more vacant lots. This is an unhealthy and uneconomic condition and is causing us to try to get a more even and less scattered form of development by restricting the use of the height of buildings."

cient supply of light and air in all but the rooms on the upper floors. Frequently, too, in normal times the tall building does not pay; for, proportionately, the construction must be heavier, the expense and waste of space for elevators is much increased, and poor light and air on the lower floors cause lower rents and a higher percentage of vacancies. Most of the exceptions are buildings not yet surrounded with other tall buildings; for to succeed the tall building must, almost invariably, appropriate without payment the light and air of many neighboring land owners.

It was suggested at the time the New York City zoning ordinance was being formulated that no land owner should be permitted, except on payment to his neighbor for the privilege, to open windows giving on neighboring land unless sufficiently distant from it to allow a reasonable access of light and air over his own land. This was proposed not so much in justice to the neighboring lot as to insure the supply of light and air for the lot itself. Buildings on the lot line often rent well for a while, and even sell well as a speculation; but ultimately become not only unprofitable but undesirable for the community. The suggestion, however, was not adopted.

Great as is the peril to the community of the tall building if its unregulated construction continues, it is nowhere yet beyond control. In New York City the narrowness of Manhattan has been supposed to make the tall building necessary, although in fact there is much land even at the lower end of the island which could be improved and more intensively developed. Even in Manhattan, where there are more tall buildings than anywhere else in the world, the average building height was in 1916 only 4.8 stories, and the buildings over ten stories in height constituted only a little over one per cent of the total. Grouped as sky scrapers are in New York City, zoning should control their spread; and zoning would seem the only way to accomplish this result.

Another effect of the unrestricted construction of tall buildings is the fluctuation in the character and intensity in the employment of land which their mere bulk causes. A tall loft building, for light manufacturing, erected on Fifth Avenue in

New York City, empties a considerable district in the neighborhood of 23rd Street or City Hall, and fills a high class shopping district with industry, to the great injury of real estate values in both districts.

Classes of Bulk Regulation.—Bulk regulations may be divided into limitations of the height and limitations of the area of buildings. The fixing of the height of buildings in this way tends to keep them from cutting off light and air from their lower portions and from each other; the limitation of their area secures a certain amount of open space for the access of light and air to these buildings; and both these provisions tend to prevent the increase of intensity in the use of land and the further disturbance of the necessary balance between buildings and public improvements and utilities.

Height regulations limit the maximum height of future structures at a given number of stories or feet above the curb or at a height equal to the width of the street or streets upon which the building abuts, or that width plus or minus a given number of feet, multiplied by two, etc. Area regulations limit the maximum area of structures either by requiring minimum courts and yards, and perhaps front, side or rear setbacks, irrespective of the size of the building or lot, or by fixing the maximum area of the structure at a percentage of the lot. Sometimes the area requirements are made to vary with the height of the building. These regulations of height and area may be the same for all buildings, or may be specially adapted and applied to certain classes of buildings, such as tenements or factories.

Zoning.—Zoning [9] is planning with relation to the differences, existing and potential, between the parts of cities. Like city and country development it is a recognition and a result of the tendency toward specialization in the use of land. If this specialization stopped at the city line and, once inside it, all land

[9] Thomas Adams, the Town Planning Advisor of the Commission of Conservation, Canada, in *Garden Cities and Town Planning* for August, 1921, and also in *The American City* for September, 1921, criticises the use of this word and suggests the employment of other expressions in some cases; but, in all probability, it is, in this country at least, too late to change.

were employed indiscriminately for the same general purpose, the same building regulations could be applied throughout the city. The same forces, however, are at work within the city, acting more vigorously in the more limited area, and, therefore, producing more numerous and sharper differentiations. Thus there are the concentrated centers, the less intensively built outer sections and the sections where the land is practically undeveloped; with a tendency toward congestion in all the built up parts of the city and the city as a whole; the city being also divided into residential, business and manufacturing sections, more or less distinct and suited to the city's needs, and undeveloped land with potentialities which should not be disregarded. It is only by bulk and use regulations varied to suit the character of these various districts that they and the city as a whole can be planned to the best advantage and the greatest usefulness.

Bulk Zoning.—With the growing employment of the bulk regulation of buildings to prevent the growth and spread of congestion in cities, has come the recognition of the fact that it is not only undesirable but practically impossible to enact adequate bulk regulations that shall be the same for all parts of the city.

In all cities there are districts where there is great concentration, and values have adapted themselves to these conditions. To pass regulations securing for these districts sufficient light and air would be a practical confiscation of a considerable portion of land values there. On the other hand, any regulation that would be fair to these congested districts would be so liberal as to be practically inoperative in large sections of the city, where present structures and values neither demand nor warrant such intensity, and would allow in them a gradual approach to the conditions in the most concentrated parts of the city. Zoning by bulk is, therefore, the only practical method of preventing the spread of congestion throughout a city and checking its increase in the city as a whole.

Use Zoning.—The prevention of the increase and spread of congestion is not the sole object of zoning. This method of building regulation is also the only means by which there

can be obtained that specialization in the use of city land essential to its most economical and efficient employment and its highest value. To attain such specialization is one of the purposes of zoning by bulk, permitting differences in intensity of development in different parts of the city; and is the sole purpose of zoning by use.

By natural location and by location with relation to public utilities and development generally, much of the land within a city is specially fitted for certain uses, and is often chosen for them. Thus heavy industry seeks the water front and the railway, the better class residences are for the most part located remote from industry and not too near business, and workingmen's houses, in the neighborhood of their work or near transit lines that will bring them cheaply and quickly to it.

But location is not the only essential to the best use of land. A section of the city suitable for residence, for instance, is often injured for that purpose by the intrusion of a certain class of factory, with its attendant smoke, noise and odors; and also, if a high class residence section, by the coming of business, or even of the tenement house. When industry or business is best suited to a district, and land will sell higher for such purposes than for any other, the locality is bound to be transformed and nothing can be done, or should be attempted, to prevent it. But intrusion often occurs where this is not the fact. Cases are common in all cities where a single factory has invaded a residence street for some more or less accidental reason and no others have seen any advantage in following. A slump in land values has been the result, the locality being no longer peculiarly desirable either for industry or for residence, the houses being put to uses to which they were ill adapted, or changed over, or left vacant, to the loss of the owners and the community. This is one of the common causes of slums.

Building regulation alone, without any special natural fitness for a given special use, is in many cases sufficient to adapt a locality to that use, and raise its land values. Often land in many parts of a city is reasonably well suited for residential purposes if only buildings offensive to residents are kept away. Still more frequently regulation is essential to preserve the

best usefulness of a district and values there. Again, a district devoted to a given purpose can be improved when this would not be possible in a district of a mixed character. For instance, it would pay to lay out parks, parkways and playgrounds in a district exclusively and permanently residential, or to lay down special pavements in a district similarly devoted to heavy manufacture, so as to facilitate the transportation of heavy loads, when this could not be done so profitably or to anything like the same extent in the entire city or any chance section of it. Zoning also prevents premature change in the character of a district, which is always a source of waste and loss. Thus where a factory obtrudes itself, not necessarily into a wrong district, but into a district long before other factories are ready to follow, the private houses in the district remain, of less utility and with lowered rents, if not vacant, until it is of advantage to the owner to replace them. Under a system of use zoning the district would remain entirely residential until there was a real need for beginning its immediate transformation into an industrial district, and the losses incidental to the change minimized.

Racial Zoning.—In all countries people of the same race tend to live in the same locality. As a result, large cities have their well defined Italian, Jewish, Syrian, Chinese, negro, and other quarters. Often the growth or change of districts inhabited by members of a race considered inferior, like the Chinese or negroes, or the desire of some of its members for betterment, brings them into contact with other peoples in the same block or multiple dwelling. This invasion of the inferior produces more or less discomfort and disorder, and has a distinct tendency to lower property values. As a result zoning on race lines has been attempted in various parts of our Southern States, where negroes are most numerous. Such zoning in this country, however, is illegal, and has never been attempted as a part of the zoning of any other country.

Nonconformity.—A factor in building regulation, making a satisfactory solution of the problem in the built up parts of cities impossible except by zoning, and difficult even with its aid, is the structure, to be found in large numbers in all such

sections, which in bulk and in the use for which it is employed does not conform to the standards which should be established for the section in which it is situated. Thus in the "schemes" for planning and zoning under the English act of 1909 and 1919, for which—as is generally the case—tracts of practically unimproved land are chosen,[10] and in German planning, in so far as it consists of "enlargement" plans for the extension into the open country of the city, solidly built up to its very edge, few if any structures are found, and in all probability such as there are will not occasion any difficulty; and the same is true in a lesser measure in the planning, as yet all too infrequent, of the outlying sections of cities and smaller localities in this country. In the zoning of the existing parts of cities, however, it is too late to escape the nonconforming structure. In a few of our cities, as for instance Los Angeles, certain nonconforming industries are required to remove from the district created, or to cease operations; and, applied as it was in these cases to more or less offensive activities, this requirement has been sustained by our courts.[11] It is not likely, however, that retroactive regulations of this sort would be held to be legal with relation to all the many kinds of nonconforming structures encountered in the completer zoning plans now becoming common in this country; and in any event such regulations are generally regarded as unduly harsh and would almost certainly stand in the way of the adoption of any plan of which they formed a part. Technical nonconformity may be avoided by making small districts for it whenever it occurs. This, however, is not a solution, but an evasion, of the problem. The structure is still where it was before, unaltered, and as much out of harmony with its surroundings as ever; whereas, although its existence must be accepted as a factor in zoning which cannot be ignored, it should be allowed to interfere with that zoning as little as possible. In order to reach a decision how best to accomplish this result, a brief examination of zoning methods is essential.

The Method of Dealing with Nonconformity.—The

[10] These acts are given practically in full on p. 518.
[11] See p. 208.

first step in the zoning of a city is a survey, the purpose of which is to ascertain the character of its various sections. The elements of this neighborhood character are: first, what may be called the character, natural and acquired, of the land—whether elevated or low, inland or on the shore, near or remote from parks, railroads, the city center, etc.—and second the character in bulk and in use, of the structures on the land. It is on the basis of this character of the locality that the regulations for it are drawn up and the exact boundaries of the districts in it fixed. Seldom if ever can the desired rules be applied, in the built up portions of the city, without encountering the alien structure. The regulation and the boundaries of the district must, therefore, be based upon the prevailing character of the district. Evidently the continued existence of structures as aliens in such districts is opposed to the general interests in furtherance of which the restrictions for the districts were adopted, and is permitted only in so far as a due regard to the special interests of those concerned with that structure demand; subject to which special interests, the structure should be reduced to conformity as completely and as speedily as possible. The accepted method of accomplishing this result is as follows: The nonconformity is in no case allowed to increase.[12] It is permitted to continue until some change in the premises is contemplated by the owner, when, in so far as expedient, the authorities take advantage of this fact to compel a lessening or complete suppression of the nonconformity.

Nonconforming Bulks.—Nonconformity may be either of the bulk of the structure in question, or of the use to which it is put. Of the two, nonconformity of bulk is much the simpler problem.[13] The present structure must, of course, remain in its present bulk; but neither nonconforming additions to it nor a lessening of the open space appurtenant to it, under the requirements of the district in which it is situated, should be

[12] In a few ordinances, some increase is allowed in certain cases, but most ordinances maintain this standard.

[13] So much so that it is not usually provided for, in zoning ordinances, under this head, but is treated incidentally, in some other part of the ordinance.

tolerated. The owner should be allowed (in so far, at least, as bulk rules are concerned) to alter his building; for alterations are usually improvements which benefit the community; but in order that full liberty may not be accorded in this way to renew the structure again and again in its original bulk, such alterations should not exceed in value a certain percentage of the value of the original building. New construction on old buildings in a given locality may, of course, differ greatly from old construction in cost per unit and therefore in bulk in proportion to value; but this is not usually the case.

So, too, if the building is accidentally damaged, the owner should be given the right to make repairs; but if the damage exceeds a certain percentage of the value of the structure, it may, and should, in the interest of conformity, be treated as if entirely destroyed; and the completely or virtually new building be required to be in accordance with the bulk rules of the district, like any other new building. Where this policy is followed the percentage fixed is from 50 to 75 per cent of the value of the building, or the building exclusive of its foundations. Some ordinances, however, allow alteration and reconstruction to the old bulk without limit.

Nonconforming Uses.—The difficult problem is that of the nonconforming use. The aim as before is to obtain as quickly as possible the suppression, or if this be not feasible, the greatest possible amelioration of the offending use which justice to that use permits. None of the modern ordinances venture to confine the nonconforming use to its original extent, requiring conformity as the price of any change in it or the premises where it exists; but many of them provide that:

1. A nonconforming use existing at the time of the passage of the ordinance, in a part of a building or on a part of the lot, shall not be extended at the expense of a conforming use.

2. In the interest of conformity uses are graded, no change from a higher to a lower grade being permitted; the only changes allowed being to a use of the same or a higher grade. Thus under an ordinance with (1) residential, (2) business, (3) light industrial, and (4) heavy industrial, or unrestricted,

classes of districts, a business use in a residential district can be changed only into another business or a residential use, a light industrial use, only into another light industrial, a business or a residential use, etc.

3. In the interest of conformity, among other reasons, heavy industrial uses are subdivided into certain named industries, and, as the last of the list, any other industry noxious or offensive by reason of the emission of odor, dust, smoke or noise. After a single change from one to another nonconforming use or subuse in a given building, there shall be no structural changes in the buildings or on the premises except at the price of conformity; after a single structural change there shall be no change of use or of subuse except on the same conditions.[14]

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[14] A few months ago a "Statement of Principles of Zoning" was formulated by Edward M. Bassett, Esq., who served as chairman of the commissions that zoned New York City. It was prepared for and discussed at a meeting of the American City Planning Institute, and amended in the light of that discussion. The Pacific coast members were not present at that meeting and do not accept all the principles of the statement; the somewhat different point of view and practice of the Pacific coast in zoning should therefore be kept in mind when considering it. (For that point of view see p. 291 of this work.) Since the statement was formulated, the decisions in favor of the single family house district, mentioned on p. 288 of this work, have appeared. Mr. Bassett does not accept as correct in theory the last five words of the statement.

STATEMENT OF PRINCIPLES OF ZONING

(1) The subject, in relation to city planning, should be called zoning, the boards, zoning boards or commissions. In laws and ordinances the word zoning should be used in the title and the word districts in the body of the law to specify the areas affected.

(2) Zoning is the creation by law of districts in which regulations differing in different districts prohibit injurious or unsuitable structures and uses of structures and land.

(3) Zoning should be done under the police power of the state and not by condemnation.

(4) Zoning by the exercise of the police power of the state must relate to the health, safety, morals, order and general welfare of the community. It follows therefore that police power zoning must be confined to police power reasons such as fire risk, lack of light and air, congested living quarters and other conditions inimical to the general welfare. The preventive regulations based on these reasons, which necessarily must be applied differently and in different measure in different districts, naturally group themselves into zoning according to use of structures and land, according to height of building and according to portion of lot covered by building. Zoning might go further

The Planning of Neighborhoods.—The segregation of similar bulks and uses and their separation from alien structures, important as it is, does not constitute all of zoning. In this branch of planning, as in all the others, the aim should be

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and embrace the subjects of fire limits, setbacks, and doubtless other classes of regulations. Enhancement of value alone or æsthetics alone has not thus far been considered by the courts to be a sufficient basis for zoning when done under the police power.

(5) Before enacting zoning regulations a city should have obtained the power to do so from the state legislature. The essential statement in such grant of power is that the city may impose different regulations for structures and for uses of land and structures in different districts.

(6) Zoning is part of the city plan and should be applied to land as early as possible; and, where practicable, at the time the street layout is adopted. Studies for zoning in undeveloped districts should be accompanied by studies for at least main and secondary thoroughfares.

(7) Zoning when applied to existing cities should be adapted generally to existing conditions but should endeavour to check undesirable tendencies.

(8) In the same city, localities having substantially a like character and situation should be zoned in the same manner. This principle should prevent arbitrary, piecemeal or partial zoning, which is dangerous and may be illegal.

(9) Zoning should be sufficiently stable to protect those who comply with the law, but at the same time should be susceptible of change by municipal authority under strict checks prescribed by state law, so that it can be altered to meet changing conditions or conditions not adequately recognized.

(10) Provision should be made that interested owners may initiate the consideration of changes, but the actual application of the zoning regulations to the land and any changes therein should rest with the municipal authority and not with the property owners. It is a wise expedient to require more than a majority vote, or even a unanimous vote, of the municipal authority to changes unless a substantial majority of the property owners affected thereby have given their consent thereto.

(11) Zoning regulations may properly be supplemented by restrictions in deeds based upon purely æsthetic reasons or for the purpose of creating a uniform residential development or for other purposes.

(12) Regulations applicable to all buildings of a class regardless of location, such as relate to plumbing, strength of material, safety devices or protection of employees against fire, should not be placed in a zoning law. They are properly part of a housing law, factory law or building law. Only those requirements which differ in different districts enter into zoning law.

(13) Use districts normally comprise residence, business, light industry and heavy industry districts. The kinds of industries prohibited in light industry districts should be enumerated. Residences should be permitted in business districts and both residences and business should be permitted in light industry districts. It is a moot question whether and under what conditions residences should be prohibited in heavy industry districts. Classes of use districts should be few. The more minute adaptation to local needs should as a rule be provided for in the area and height zoning and by permitting special uses under conditions stated in the ordinance or under the administration of a board of appeals

to unify the community. Attention has already been called to the need of correlating the public and private features of the city. It is also necessary to relate the various private features to each other. To a considerable extent this may be done

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empowered to make building exceptions. There is lack of agreement as to the desirability and legality of prohibiting apartment houses, flats, tenement houses and other multiple dwellings in certain districts limited to single family dwellings.

(14) Where zoning regulations apply only to new buildings (as is the safer practice) buildings occupied for non-conforming uses should be placed under constant pressure to become conforming, through changes, with the lapse of time.

(a) Structural alterations made in a non-conforming building should not during its life exceed one-half its value, nor should the building be enlarged unless its use is changed to a conforming use.

(b) No non-conforming use should be extended by displacing a conforming use.

(c) In a residence district no non-conforming building or premises devoted to a use permitted in a business district should be changed into a use not permitted in a business district.

(d) In a residence or business district no non-conforming building or premises devoted to a use permitted in a light industry district should be changed into a use not permitted in a light industry district.

(e) In a residence, business or light industry district no building devoted to a use excluded from a light industry district should be structurally altered if its use shall have been changed since the time of the passage of the ordinance to another use also excluded from a light industry district.

(f) In a residence, business or light industry district no building devoted to a use excluded from a light industry district should have its use changed to another use which is also excluded from a light industry district if the building has been structurally altered since the time of the passage of the ordinance.

(15) In business and industry districts towers within a prescribed height limit should be permitted but should not occupy over one-quarter of the lot area. They should be allowed on the street line all the way up, but should stand away from side lines according to a suitable rule.

(16) Height limitations should be determined primarily by widths of streets and the use of property. There should also be flat maximum limitations irrespective of street widths which should be fixed with due regard to local conditions.

(17) Included in area limitations there should be a provision for the percentage of lot that can be covered and a limitation of families per acre or of the minimum square feet of lot area per family.

(18) There should be an administrative board with power under state law.

(a) to rectify on appeals the errors of building superintendents in passing on applications for building permits.

(b) to decide border line and exceptional cases of buildings where specified in the ordinance.

(c) to vary the literal requirement of the law in individual cases of buildings where unnecessary and excessive hardship is caused and the intention of the law is equally accomplished by an alternative method to be prescribed.

by locating the different districts each in its proper position with regard to the others and to the city as a whole. Evidently the larger and more general relations, such as that of the low priced housing district to the manufacturing district, and the retail to the wholesale business district, must be conserved. It is also essential that the smaller and more intimate relations, which are so important a part of family life, should be respected. People must live in neighborhoods and preserve all the elements needed for neighborly contact or home life will not be economical, convenient and happy. The garage, the small grocery, the drug store, must be within easy reach of the home, especially if it is a modest one. In fixing the location, boundaries, size and shape of districts, this must not be lost sight of. One reason why the street is such a good districting unit is because it lends itself to the creation and preservation of these minor relations by permitting the location of distinct uses on different but nearby streets. Of late the importance of the neighborhood building for the cultivation of friendly relations, as well as for pleasure and instruction, has been much urged. To the neighborhood group belong such structures as the church, the school, the playground and the minor public buildings, situated adjacent to the small local park, so as to form a real neighborhood center.

Zoning and Land Values.—Zoning regulations are imposed upon private property under the police power, without compensation. Obviously they restrict, to some extent at least, the right and power which the owner of property affected previously had of dealing with it. Under our law such regulations must, if valid, be for the general interest. It does not follow, however, that they are adverse to the interests of the property owner, or benefit him only generally as a member of the community. Regulations which adjust rights between property

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Not only should the powers of such a board be specified in the ordinance, but the state legislature should authorize the municipal authority to create such a board and to provide in the ordinance what border line and exceptional cases it may decide. A larger vote than a mere majority should be required for an affirmative decision. Proceedings and records of the board should be public and the members of the board should be removable for cause. Decisions of the board should be subject to court review on suit by any citizen.

owners, virtually conferring rights as well as taking them, often increase the values of the properties concerned. Thus a conservative height limit, lessening congestion for the good of the city as a whole, takes from the property owner the valueless right to build to excessive height, and confers upon him the equivalent of valuable easements of light and air over neighboring land, of which neighboring buildings above the limit would deprive him.

Zoning rules, like all police regulations, may be to the detriment of the owners of the property affected, and if sufficiently in the public interest would no doubt be sustained by our courts. Thus a requirement in a congested neighborhood, that buildings should not in future exceed a certain height, would, if essential to public health, be upheld regardless of its results on real estate values; and the Supreme Court of the United States has already sustained a regulation compelling a nuisance industry to remove from a residential neighborhood, greatly to its loss.[15] Zoning regulations which do not raise values, and even those which lower them, may be for the advantage not only of the community but of the property owners especially concerned. Property values are not the only values. In a residential district of a city where men own their homes, the exclusion of business, even if it lessen the selling price of the houses (and experience shows that this is not usually the case), increases health and comfort, and would without doubt give satisfaction to those concerned, as it might not do in a city where only a small percentage of homes were owned by their occupants. Nevertheless it remains true that in most cases market prices are a fairly accurate measure of social and service values, and that the effect of zoning on the money value of real estate is a matter of importance.

On principle it seems clear that wise and conservative zoning, except where property values are subordinated to other considerations—as, without doubt in some cases they should be—raises aggregate values and as a rule values to the individuals whose property is subjected to it. The object of use

[15] Ex parte Hadacheck, 165 Cal. 416 (1913); Hadacheck v. Sebastian, 239 U. S. 394 (1915).

zoning, in a measure at least attainable, is to put the land of the city to the use to which it is best adapted; and such zoning will normally increase total values. Normally, too, this will be accomplished, so far as humanly and politically possible, by devoting the land of each individual owner to its best use, thus increasing values to him. Often, also, as has already been pointed out, use zoning prevents waste, to the benefit of the community and the individual property owners. Inevitably, also, any reasonable limitation on the height and area of buildings will increase total land values. The demand for land for a twelve-story building of given ground area is only half that of two buildings each of the same ground area and each six stories in height, the cost of the two six-story buildings and of the twelve-story structure would be about the same; and if the six-story limitation is the right one for the locality, the two buildings would be more useful and profitable than the single, taller structure. Similar considerations show the result of similar area restrictions to be the same as in the case of height regulation.

In a word, zoning, by its bulk and use prohibitions, does not prevent the construction of buildings, or lessen their value or amount, but merely regulates their location; and, if wisely done, increases their usefulness. Inevitably, therefore, such zoning, except in so far as property considerations are sacrificed to more important social demands, increases individual and aggregate money values and returns. These conclusions are in accord with experience, both abroad and in this country.

CHAPTER II

ZONING IN EUROPE

Origin of Zoning.—Zoning, although in germ French,[1] was first developed in Germany, and it is in that country that it has been most widely employed. The system, embracing both use and bulk zoning, began to come into general use in Germany about 1894; and, like workmen's compensation and so many other social measures, soon spread to other lands. It is now to be found, in one form or another, in the principal countries of Europe excepting France, in England and other

[1] Use zoning was the first to appear. The earliest statement of this phase of the theory seems to have been a resolution of the German Architectural and Engineering Societies, Richard Baumeister and Franz Adickes, referees, at a meeting held in Berlin, September 24, 1874; see the "Deutsche Bauzeitung" for 1874, p. 265-337; an article on "Stadterweiterungen" by Adickes in the first edition of Conrad's *"Handwörterbuch der Staatswissenschaften"* (Jena, 1893), Vol. 5, p. 847 (1893) and Baumeister's book, referred to below. The first careful formulation of the theory of use zoning was by Baumeister in his book entitled *"Stadterweiterungen in technischer, baupolizeilicher und wirtschaftlicher Beziehung"* (published by Ernst and Sons, Berlin, 1876). In that book, p. 84 ff, he traces use zoning back to the decree of Napoleon I, issued October 15, 1810, while Protector of the Confederation of the Rhine, to be found in the (French) *Bulletin des lois* for 1810 (second half year), p. 397, being No. 6059.

This decree provides that establishments which disseminate an unhealthy or unpleasant odor shall be erected only on administrative license. It divides such establishments into three classes of which the first shall not be erected near a human habitation, their exact location and distance from residences to be fixed by the administrative authorities. This decree formed the basis of the Prussian law (Allgemeine Gewerbeordnung, passed January 17, 1845, Gesetz Sammlung, 1845, Nr. 2541) on this subject, and this law was in substance followed by the North German Confederation in its industrial law or "Gewerbeordnung" of June 21, 1869, Bundes-Ges. Bl., 1869, Nr. 312, which was the foundation for the provisions of the law of the German Empire on the same subject, the well-known "Reichsgewerbeordnung." It was under this law, administered by the state authorities, that the so-called "protected district" to be discussed later, which is the simplest and earliest form of use zoning sprang up. See generally an article on "Gewerbliche Anlagen," Vol. 2 of the *Wörterbuch des deutschen Staats-und Verwaltungsrechts*, p. 248.

parts of the British Empire, including Canada, and in this country, where it is making rapid progress. Recently it has also spread to Japan.

Use Zoning First to Appear.—The earliest form of zoning to appear in Germany was a simple form of use zoning. In the legislation of some of the German states, and later in the laws of the German Empire, there was provision for the keeping of more objectionable manufacturing establishments at a distance from residences.[2] Under the Empire the right to take this action was derived from the Imperial "Industrial Law" by some of the provisions of which such establishments were required to obtain a special license from the state or local authorities, often granted subject to conditions.[3] Out of this system grew the practice of establishing one or more "protected districts" in which such establishments were not permitted, and therefore residences and business were secure from the intrusion of most if not all heavy manufacturing and similar annoyances. This system of laying out protected districts, which often consist of most, if not all, the city except one or more carefully chosen sections, thus constituting the manufacturing districts of the city, is a part of the zoning plan of many German cities to this day; and, in many smaller communities, one protected district is found to be sufficient zoning provision without the enactment of any other zoning regulations, either of bulk or of use.

The Beginnings of Bulk Zoning.—Bulk zoning was first resorted to in Germany as a method of planning additions to cities. The protected district, by segregating heavy manufactures and other structures each in its own appropriate part of the city, tended to prevent disorder in the city. Disorder, however, was by no means the only evil in city growth. In the

[2] See page 210, note above.

[3] The Imperial law does not prevent the state from making similar regulations with regard to industrial establishments which are objectionable, and which are not included within the Imperial law; for decisions to that effect see the reports of the highest Prussian administrative court or Oberverwaltungsgericht, Vol. 10, p. 260, Vol. 11, p. 307, Vol. 14, p. 323, Vol. 18, p. 302, Vol. 23, p. 268. It is mainly on the basis of these state regulations, more numerous and far-reaching than those of the Imperial law, that use zoning has developed to its present extent in Germany.

old city the height and area of buildings had been regulated for generations by rules which were the same throughout the limits of the city; and under these regulations cities had grown uniformly congested. In the early seventies cities in Germany, as in all modern countries, were growing enormously, and the additions, under the same regulations as those of the old city, were becoming equally congested. The new land, unimproved and comparatively cheap in price, afforded the last opportunity for all time of ameliorating to any considerable extent the condition of German cities; and the only way of utilizing this unique opportunity was to pass building regulations especially adapted to the new city, which existing developments and existing land prices made impossible in the old. Thus bulk zoning at first consisted of two sets of regulations, one for the old city or city proper, the other for the new city or city suburbs; and to this day in many smaller cities in Germany these two bulk districts, with or without one or more protected districts, are found to be sufficient; and, being sufficient, are better for them than any more complicated system.

Bulk Zoning at First Simple.—The first city to adopt a bulk zoning building ordinance was Altona, a suburb of Hamburg. It was passed in 1884, while the well known Franz Adickes, later in Frankfort, was its Bürgermeister or mayor, and was of the simple sort above described.

Development of Bulk Zoning.—In the larger cities bulk zoning in its first simple form was found to be inadequate. The price of land, instead of changing once and for all at the boundary of the city, varies throughout the city and its suburbs on account of varying distance from the city center and for many other reasons; and in order to take full advantage of these districts of ever cheaper land, regulations adapted to each of them and thus growing more restrictive as land prices decrease, must be resorted to. This system of bulk regulation was at first called the Zone System, but is now known as "graduated [4] building regulation." With the various residential and industrial use districts subject to the bulk regula-

[4] "Abgestufte" or "Staffel." The term "zoning" was never applied in Germany to graduated use regulation as it is in this country.

tions of the zone in which they are situated,[5] it was first applied in Frankfort-on-the-Main in 1891 and perfected there within the next twenty years, under the guidance and inspiration of Adickes, who had become its mayor.[6]

Zoning in Frankfort.—Frankfort is divided into an old or inner city, and an outer city. The inner city is the first bulk zone. The outer city is divided into an inner, an outer, and a country zone. In the inner city, already closely built with structures devoted to all kinds of uses, no use districting was attempted and the erection of all sorts of buildings except certain nuisances is permitted. In the zones of the outer city there are residential, manufacturing and mixed use districts, subject to the bulk restrictions of the zone in which they are situated.

In the inner city the highest buildings are allowed. They must not exceed the width of the street plus 2 meters, or in any case, however wide the street, 20 meters; on streets less than 9 meters wide, a height of 11 meters is in all cases permitted.[7] This is to the cornice; the roof above this is restricted by an angle of 45 degrees. The roof is more than a mere roof; although not technically so regarded, it is nevertheless in fact a roof story, in which there are rooms, which, however, may not

[5] With exceptions in the case of heavy manufacturing; see pp. 242, 243. It will be noted that the boundaries of height, area, and use restrictions are—as universally except in this country—the same.

[6] For an authoritative statement of the zone system in this form, see an article by Adickes entitled *"Stadterweiterungen"* in Conrad's *Handwörterbuch der Staatswissenschaften* (1st ed., Jena, 1893), Vol. 5, p. 847, already referred to; and the somewhat different article in the 3rd edition, 1911, Vol. VII, p. 780. In the above articles, as always, Adickes cites copiously from English housing experience in support of his positions. In his article he refers to a report of the German Health Society, drawn up by Baumeister and himself, and passed May 25, 1893, as apparently an early, if not the earliest complete formulation of the zone system in print. For a brief statement of this phase of zoning see R. Baumeister *Moderne Stadterweiterungen* being No. 7 of *Deutsche Zeit und Streit Fragen* (published by Richter, Hamburg, 1887).

In the development of bulk zoning, a number of writers give credit to Austro-Hungary; see, for instance, "Wohnungsverhältnisse, Bauordnung und Grundstückspolitik der Stadt Cöln" by Dr. Edmund Wirtz, III, printed by the Schutzverband für Deutschen Grundbesitz, Berlin, 1914, p. 19. For an account in English, of the development of zoning in Germany, see the *Report of the Heights of Buildings Commission to the Board of Estimate and Apportionment,* New York City, Dec. 23, 1913, Appendix III, p. 94.

[7] Street width plus three meters is sometimes allowed if the extra height is not used to construct an extra story.

always be used for residence, and when so used cannot as a rule be an independent residence but must be auxiliary to an apartment in the floor below. The number of stories in residential buildings is also restricted; in this zone it must not exceed five plus the roof story. In the inner city, also, the greatest proportion of the lot may be covered with buildings, three-quarters—for corner lots five-sixths. Solid blocks, without break between the buildings, are permitted. The city here presents the appearance of being fully built up to a fairly uniform height.

In the residential districts, situated in the various zones of the outer city, factories are so discouraged by severe bulk regulations as to be practically forbidden. In the manufacturing districts to be found for the most part along the railroads, the harbor, and out of the city in such direction that the prevailing winds will blow the smoke away from the city, the bulk restrictions are mild, and do not, as in the other districts, become progressively greater. In manufacturing districts residences, except in each case one, for the owner or an employee, are forbidden.[8] The mixed districts are near the manufacturing districts, and there too, under restrictions somewhat more severe than in the manufacturing districts, are to be found structures devoted to most of the various industries.

In the residential districts a space between neighboring houses of 3 meters in the inner zone, and a third more in the outer zone, is required. This is generally used for a broad walk with green grass bordering it on each side of the high fence that divides the two lots. Groups of buildings are, however, allowed with a somewhat less proportionate amount of free space for the group as a whole. In the villa district only low detached and semi-detached houses on large lots are allowed.

In all these zones the amount of the lot that must be left free progresses until in the villa districts it is seven-tenths of the entire lot. So also the permissible height exclusive of the roof story and roof decreases to 16 meters, and the number of stories to two. In no case, however, may the house in this

[8] This is under an amendment of 1912. This prohibition exists in very few other ordinances.

zone exceed in height, except for the roof story and roof, the width of the street upon which it stands.[9]

Absence of Business Districts.—It will be noticed that the Frankfort ordinance does not establish districts for business from which manufacturing is excluded, as the zoning ordinances in this country do; nor does it forbid business, as such, or even some forms of light manufacturing, in residential districts, as is done here, except by private covenants. These covenants in Frankfort cover considerable territory, and are often made a part of the public ordinance. The tendency to separate business and residence, so strong in England and this country, is much weaker on the continent of Europe, where, almost without exception, apartments are to be found over stores and offices. In Berlin there is not a single block where business has entirely driven out residences, and very few in Paris or Vienna. Nor could business and industry in Germany be completely excluded from any district by law. In Prussia, under ancient statutes, it is the duty of the police to protect the public health, order and safety; but they can promote the general welfare only by virtue of specific provisions of law. The Prussian courts have upheld ordinances segregating industries offensive by reason of the emission of odor, smoke, noise, etc.; and ordinances excluding from residential districts not only these industries, but all activities likely unduly to increase traffic or in any way to disturb the peace and quiet of such localities. Prussian courts have repeatedly held, however, that business and industry that was not objectionable on grounds such as these could not be excluded;[10] and this has always been the law in all the German states. In 1918, however, Prussia in her Housing Law[11] materially increased the power of her

[9] Except that on streets less than 9 meters wide, the height may always be 9 meters.

[10] Decisions of the "Oberverwaltungsgericht" (or highest administrative court) of Prussia, Vol. *26*, p. 323 (1894); 37, p. 401 (1900); 57, p. 461 (1910); and cases cited therein, an abstract of which opinions is given in the *Report of the Heights of Buildings Commission*, New York City, 1913, p. 110. See generally on Prussian Building Police Law, Baltz, *Polizeirecht*, 4th edition, 1910, Carl Heymann's Verlag, Berlin; also Meyn, *"Stadterweiterungen in rechtlicher Beziehung,"* 1893.

[11] Art. 4, sec. 1, no. 3. For a synopsis of the law as a whole see p. 466, ff.

building police in use zoning by providing that "By building ordinances provision may be made . . . for the selection and special regulation of particular parts of cities and towns, streets and squares, in which the erection only of residential structures with their accessories, or of industrial establishments with accessory buildings, is permitted."

The Courts Sustain Zoning.—In 1902 zone ordinances, at that time the most radical in Germany, were issued for a part of the suburbs of Berlin.[12] It was with relation to a provision in these ordinances that in 1904 the first decision in Germany on the validity of bulk zoning was rendered by Prussia's highest administrative court, sustaining it as a health measure.[13] After this decision removed all doubt as to the legality of bulk districting, the system soon began to be generally adopted in Prussia and throughout Germany.

Later Zoning Regulations.—Further experience in Germany soon led to the abandonment in most places of the attempt to regulate bulk by broad zones of increasing distance from the old city. Thus in Dresden and other cities where there were numerous centers of concentration and high land values, regulation, both by bulk and by use, is by districts, which are generally of small size so as more accurately to fit complex conditions; in Frankfort, still regulated by zones, certain streets, such as main traffic thoroughfares, running through more than one zone, were found to have characteristics which made it seem wise to pass special regulations for them, thus splitting up the zones; and in Stuttgart, Karlsruhe and other places, zones and districts were altogether abandoned in favor of the regulation by streets; or, to be more accurate, the street, single or in groups, was adopted as the sole unit in zoning. Partly, perhaps, in consequence of this evolution, bulk zoning in Germany is less frequently called zoning, but the more accurate and inclusive expression "graduated building regulation" is gener-

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[12] With regard to zoning in Berlin see B. Wehl, *"Die Wirtschaftlichkeit der wichtigsten Bauklassen von Gross-Berlin,"* (Berlin, C. Heymann's Verlag, 1914); and Frank Backus Williams, *"Building Regulation by Districts, the Lesson of Berlin,* Publications of National Housing Association, No. 24, New York City, 1914.

[13] *Oberverwaltunsgericht,* Vol. 26, p. 323 (1894).

ally used.[14] In some cities, however, zones, in fact and in name, are retained, and the newer differentiations added. Thus in Düsseldorf in addition to five zones covering the whole city, and rules for special streets, in many cases running through several zones, there are eleven classes of streets within one or other of the zones. These classes are in most cases created for various types of housing. The distinctions are often very minute. There are, for instance, two classes for one and two family houses in blocks, the one with and the other without rear buildings; two classes, similar in all respects to these, except that three family houses are also allowed; two classes, alike in all respects to those first mentioned except that in each case the houses must be detached, the required open spaces between the houses and the side line of the lots varying, however, in breadth; a class for the better sort of tenement houses in blocks, with not more than two families in each story; a class for tenement houses similar in all respects to the class first mentioned except that they are to be of cheaper and simpler construction, and suitable for not more than three families on any one floor, etc., etc. When it is remembered that the lots on which these class restrictions are imposed are widely scattered throughout the zones, and subject not only to class but to the various zone restrictions as well, it is not surprising that many city planners in Germany think the regulations there too detailed and intricate, and those which, as in Karlsruhe, adopt the street as the sole zoning unit, preferable.[15]

[14] To graduated bulk differentiation has been added during the last fifteen years in Germany, in all the modern building ordinances, differentiation graded to accord with the various types of houses, for one and two families, for from three to six families (the so-called "Bürgerhaus") and for more than six families (the large tenement house); the requirements lessening with the decrease in the number of families the house is to accommodate.

[15] The construction of tall buildings has been suggested of late in a number of European countries, uniformly, as yet, without success. For information with regard to the movement in Germany the curious reader is referred to: A. Bredtschneider, *Die gross Berliner Bauordnungen, ihre Bauweisen und ihr Geltungsbereich,* Berlin, C. Heymann's Verlag, 1919; B. Möhring, *Ueber die Vorzüge der Turmhäuser und die Voraussetzungen unter denen sie in Berlin gebaut werden können,* Berlin, Zirkel-Verlag, 1921; P. Wittig, *Studie uber die ausnahmsweise Zulassung von Turmhäusern in Berlin,* Berlin, 1918, im Selbstverlag; and an article in the 1921 *Deutsche Bauzeitung,* p. 388, entitled *Der Uebergang zum Hochbau.*

Zoning in England.—In England zoning was introduced in 1909 when the first town planning act in that country was passed. Under it areas are chosen for planning and a special scheme drawn up for each area. It is as a part of such schemes that zoning both by bulk and by use, is done.[16] This method of planning has the advantage of selecting areas for development which are most in need of it, such as vacant land near cities; and the disadvantage that as a rule only portions of cities are planned instead of cities as a whole. Zoning as a part of this system shares its drawbacks and advantages, including the advantage, largely lacking in other countries, of the close association of the planning of the public features of the community and zoning or the planning of the private features.

Note D

No. 1. Housing in German Cities

In 1910 the German Imperial Statistical office issued, in its series of Workmen's Statistics, a volume entitled *Housing in German Cities.*[17-18] The relation between city planning and housing is a close one. This is especially true of zoning and housing. In order, therefore, to understand zoning in Germany it is especially necessary to get some idea of her housing legislation. This volume, giving as it does a summary of the legislation and ordinances as they existed in both these fields in 1909, affords an excellent means to that end. The information used in the book was obtained from 106 cities, including all cities and city states (like Bremen and Hamburg) that, according to the census of December 1, 1905, had more than 50,000 inhabitants; and also a number of cities that, in relation to housing, were of special interest.

The following passages, taken from the preface, show the purpose and scope of the work:

"The first division of this work treats of the legal side of housing. It gives the substance, selected from certain special points of view, of the regulations in force in these cities; the building regulations;

[16] It is not, however, called zoning, but is described in the various schemes under the act and the laws dealing with them, by such expressions as "allocating particular sites for particular sorts of buildings," "limiting the number of dwelling houses to the acre," etc.

[17-18] *Beiträge zur Arbeiterstatistik, No. 11; Wohnungsfürsorge in Deutschen Staedten;* Bearbeitet im Kaiserlichen Statistischen Amte, Abteilung für Arbeiterstatistik, Berlin, Carl Heymann's Verlag, 1910.

the housing ordinances; the ordinances regulating lodging houses; the provisions with relation to the inspection of dwellings. . . .

"From the building police regulations substantially the following provisions were chosen: Height of buildings (front and rear buildings), number of stories, permissible area to be built over and size of court, space between buildings of adjoining proprietors, dwelling rooms in general, roof and cellar rooms, water-closets; also such provisions as contain modifications lessening the requirements with regard to the construction of small houses, one-family houses, etc. These are essentially health measures."

"How far the building ordinances, especially their gradation, in zones or districts, from the interior of the city to its outer sections—chiefly with relation to area covered, height, and number of stories—were the result of other, especially socio-political considerations, could not be shown; still less how far these provisions were successful in causing, for instance, lower rents. The reader will remember the opinion so often expressed with emphasis since about 1890, much furthered by the works of Rudolph Eberstadt, that (to use his words) 'the first effect of the systematic use of the congested, many storied system of building in residential sections is a rise in house rents.' The controversy whether the large tenement house makes dwellings dearer or cheaper must be considered as still unsettled.[19] For this reason it seemed proper in the present work to give in all possible detail the particular provisions of the building ordinances on these points, so as in this way to lay certain foundations for further investigations with relation to this question. Nor was it possible within the limits of this work to determine to what extent outer sections for which building ordinances fixed a lesser intensity of building were in fact inhabited by the working population or those of less financial ability.

"The second division of this work is devoted to an account of the more direct methods of cities in securing good housing. First in this division are sections with regard to the inspection of dwellings, and information bureaus of vacant dwellings. In the next section follows a description of the measures for the promotion by cities, directly or indirectly, of the building of houses with small apartments; their provision of dwellings for their own laborers; their actual building of houses with small apartments; their making of loans; their making of pledges, granting of building land free or cheaply, and reduction of or granting credit for the payment of the costs of street construction or of assessments for the same; their giving of land on building lease or contract for repurchase. Only the measures taken by the cities themselves are considered and not

[19] Comp., for instance, B. H. Herkner, *The House Question and the City Plan*, No. 5 of Vol. 1, of *Städtebauliche Vorträge* (Berlin, 1909), p. 15; Adolf Weber, *Ground and Dwelling*, Leipzig, 1908, p. 88 ff.

the activity of building societies, private parties, etc., in these cities. The object especially in view, as was stated at the outset, has been the investigation of the housing of the workman; but as, in the first division of this work, the legal measures with relation to the housing of working men could seldom be distinguished from the legal measures with regard to housing generally, so in the second division of the work, the measures for the encouragement of the building of workmen's dwellings are often undertaken not for the working population alone but for the poorer classes generally."[20]

The introduction to this work gives a summary of the regulations and statistics it contains. A translation of part of that introduction follows:

"A number of German States (Bavaria, Württemberg, Baden, Hesse, Brunswick, Anhalt) have issued general building regulations for their entire territorial limits. In these states the provisions of the separate states, contained in the state building regulations, may be enlarged or in certain points changed as local conditions may require. . . . In Prussia there is no state building ordinance.[21] . . . At present, with the exception of a few general principles of the General State Law[22] I, 8, secs. 33 et seq., building police law will be found in the building police ordinances of the cities that, in accordance with the law of March 11, 1850, sec. 6, and the Law with regard to general state administration,[23] of July 30, 1883, secs. 137 et seq., are passed generally by the local police, with the consent of the executive or upper branch of the local Council,[24] Bürgermeister, etc. . . .

"A majority of the cities have passed so-called zone building ordinances. The principle of the zone building ordinance is that for particular, especially outlying districts of the city, graduated, materially severer provisions, exist than for the city center. The graduations are principally in the provisions with regard to the amount of the lot that may be covered with buildings, their height and number of stores. . . .

"Other cities have not, indeed, passed a zone building ordinance —i. e., did not, on passage of the building ordinance, divide in a sys-

[20] References are further given to the following works: *Handbuch des Wohnungswesens,* by R. Eberstadt, Jena, 1909 [there is now a fourth edition, 1920]; *Kleinhaus und Meitkaserne,* by A. Voigt and P. Geldner, Berlin, 1905; *Städtebauliche Vorträge,* by Brix and Genzmer, already referred to; and the bibliographies in these works and in the "Zeitschrift für Wohnungswesen."

[21] See in this connection the Prussian Housing Law, passed in 1918 (p. 466, ff. of this work), which, although not thoroughgoing enough to be called a state building law or ordinance, does contain certain state-wide housing regulations (author).

[22] "Allgemeines Landrecht."

[23] "Allgemeine Landesverwaltung," Ges. Samml., 1883, Nr. 8951.

[24] "Magistrat."

tematic manner the entire territory of the city into zones—but nevertheless, by the passage of amendments for given districts, have provided a less intensive use of the land for building purposes. The introduction of such restrictions on building for separate parts of the city through a zone building ordinance or through amendments may have as its object to secure to them a villa or country character, or it may have come from the intention to force back the large tenement house and, through introduction of low building, to provide healthier and cheaper dwellings. Which of these motives was determining in any case in the passage of building ordinances, and how these intentions have resulted in fact, could not here be shown.

"Here reference is also made to the graduated building provisions which contain less severe requirements for 'small buildings,' 'small dwelling houses' 'one and two family houses.' The less exacting provisions are principally with relation to the use of building materials, the amount of the lot that may be covered, the clear height of dwelling rooms, etc. Such graduations and milder provisions have chiefly been adopted by the following cities: Königsberg, Posen, Bromberg, Breslau, Magdeburg, Halle, Altona, Dortmund, Frankfort-on-the-Main, Düsseldorf, Elberfeld, Oberhausen, Rheydt, Neuss, Coblenz.

"Of the health provisions of the building ordinances with relation to the building itself, those with relation to the height of buildings, the number of stories, the amount of lot that may be covered or size of court, the space between neighboring buildings or detached or partly detached buildings, have been chosen for detailed presentation.

"Next come the provisions with relation to height of buildings, since, in connection with the provisions with regard to the distance of the building from buildings opposite, they determine the share of light and air for the inhabitants of the building in question. With regard to the relation of the height of buildings on the street to their distance from opposite buildings, the usual provision is that the height of the building shall not exceed the breadth of the street. This provision, for instance, is also that of the state law for the cities here considered. So, according to the Bavarian Building Ordinance (Royal Ordinance with relation to building of February 17, 1901), 'the height of private buildings, whether newly erected or raised by addition of stories, may not exceed the breadth of the street, including the sidewalk and any front garden.' [25]

"According to the General Building Law for the Kingdom of Saxony of July 1, 1900,[26] 'the height of buildings shall not, as a general rule, exceed the breadth of the street, including any front garden.' The same provision is found in the state building ordinance of Baden and in a building ordinance for the duchy of Anhalt. In accordance

[25] I.e., setback, which must be used as a lawn or garden.
[26] Gesetz- u. Verord-Blatt, 1900, p. 381.

with the state building ordinance for Hesse, of May 27, 1881, however, 'the greatest permitted height of private dwellings shall not, as a rule, exceed the width of the street, including the sidewalk and the front garden, by more than 2 meters.' In accordance with the state building ordinance for the duchy of Brunswick, of March 13, 1899, 'the height of buildings to be erected on the street shall not exceed the width of the street by more than 4.5 meters.'

"The provision that the height of buildings shall not exceed the street width is found as the fundamental provision in the majority of the building ordinances of the cities here considered. In addition there is usually given a fixed measure as the greatest measure of the height of buildings, for which regularly the height of the building is reckoned from the ground to the upper edge of the roof cornice. There will be found also in the cities with zone building ordinances sharper provisions for the outlying zones. So in Posen the height of buildings in general must not be greater than the established street breadth; but, nevertheless, in the first building class, at most 20 meters; in the second, 17.50 meters; and in the third, 15 meters. Similar graded provisions with the fundamental provision that the building height shall not exceed the street breadth are in force, among others, for Königsberg (for streets less than 7 meters in breadth, always 7 meters high), Breslau (Zones II, III and IV), Kiel, Flensburg, Hagen, Frankfort-on-the-Main (outer city with a street breadth up to 9 meters, always 9 meters), Cassel, Düsseldorf, Essen, Cologne (Zones II, III and IV), Mannheim, Freiburg. The fundamental principle that the height of buildings shall not exceed the street breadth is in force also in Berlin and its suburbs, Görlitz, Königshütte, Gleiwitz and Beuthen, Luneburg, Pforzheim, and the Bavarian and Saxon cities.

"In a number of cities on streets of a given breadth or less the height of buildings may exceed that width; but on streets of more than that width the height may not exceed it. This width is:

City	Meters	City	Meters
Spandau	10	Münster	15
Potsdam	10	Bielefeld (outside the walls)	10
Brandenburg	10	Wiesbaden	11
Frankfort-on-Oder	10	Duisburg	15
Stettin	15	Barmen (2nd zone)	14
Bromberg	11	Saarbrücken	12
Magdeburg	11.50	Grand duchy Saxony	11
Altona	11	Brunswick (outer city)	9
Hanover	10	Bremen	11
Dortmund	15	Metz	15
Bochum	13.50		

"In a number of cities the breadth of the street may be exceeded by a given measure. This is true principally of the cities in Würt-

temberg, where the street width, generally, may be exceeded up to 45 meters; also of the cities in Hesse, where it may as a rule, or from a given breadth on, be exceeded up to 2 meters.

"In a still further number of cities, in so far as the street breadth reaches a fixed minimum, the height of buildings may exceed the street breadth by a fixed measure in addition to that excess. Thus the height of buildings in Cologne (first zone) with a street breadth of more than 8 meters, may exceed 11.50 by as much as the street width exceeds 8 meters. Bonn, Mülheim-on-the-Rhine, Coblenz and Colmar have somewhat similar rules.

"Further, in a number of cities, the building height may exceed the street width as a rule, or from a given street width on. So in Danzig, with a street width of over 12 meters, the height of the buildings may be 1¼ the street breadth. In Hanover, with a street width up to 10 meters, the building height may also equal 1¼ the street breadth. In Osnabrück, with a street width up to 8 meters, a building height 1½ times the street is allowed. In Lübeck, up to a depth of 20 meters behind the building line, a building height of 1½ times the street breadth is allowed. In Barmen, in the first zone, with a street width over 10 meters, a height of building of half the street width plus 9 meters is allowed; in the second zone, with a street breadth of from 10 to 14 meters, a height of half the street breadth plus 7 meters is allowed.

"As above stated a majority of cities have established a maximum for height of buildings beyond which nothing may be built.[27]

"In cities with zone building ordinances this height grows less in the outer districts. So far as relates solely to the respective first zones, it appears that a maximum height of 22 meters (a greater measure does not occur in the cities here considered) is allowed in the following cities: Berlin, Charlottenburg, Schöneberg, Rixdorf, Deutsch-Wilmersdorf, Lichtenberg[28] (the five last-named places in so far as their territory lies within the ring railroad), Breslau, Altona, Kiel and Cassel; the Bavarian cities; the Saxon cities, except Dresden, Zittau and Grimmitschau-Mayence and Rostock. Königsberg has a maximum height of 21 meters.

"A maximum height of 20 meters exists in Danzig, Stettin, Posen, Königshütte, Gleiwitz, Reuthen, Magdeburg, Erfurt, Flensburg, Hanover, Hamburg, Dortmund, Gelsenkirchen, Frankfort-on-the-Main (inner city), Düsseldorf, Duisburg, Elberfeld, München-Gladbach, Cologne, Bonn, Mülheim-on-the-Rhine, Aachen, Stuttgart, Ulm, Heilbronn, Karlsruhe, Mannheim, Brunswick.

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[27] Except, as a rule, public buildings, monumental buildings, etc.; and turrets and other ornamentation to a limited height and amount. (Author.)

[28] The five cities last named have, excepting government, been a part of Berlin for many years, and are now, with outlying municipalities, legally a part of it.

"The maximum height of 19 meters is fixed for Wiesbaden, Freiburg, Bremen; of 18.50 meters for Mühlhausen-in-Alsace; 18 meters for Charlottenburg, Schöneberg, Rixdorf, Deutsch-Wilmersdorf, Lichtenberg (so far as this city lies outside the ring railroad), Brandenburg, Frankfort-on-Oder, Görlitz, Liegnitz, Halle, Osnabrück, Münster, Bielefeld, Essen, Barmen, Crefeld, Coblenz, Saarbrücken, Zittau, Grimmitschau, Lübeck.

"A maximum of under 18 meters exists in Hagen, Solingen, Rheydt. . . .

"The number of stories allowed in cities with zone building ordinances grows less from the interior to the outskirts. A few cities make the number of the stories dependent upon the street width. This is true of Harburg, Bochum, Barmen, Pforzheim. . . .

"In many cities both the amount of the lot that may be covered and the minimum size of courts is fixed. . . . For corner lots . . . there are provisions that allow an intenser use. In the building ordinances that provide for a division by zones, the provisions with regard to the amount of the lot that may be covered are, throughout, so graded that in the outer districts only a small part of the surface may be used for buildings. In the following summary only the first, or inner, zone will be considered:

"As the proportion of the lot that may be built over in a majority of cities, three-quarters of the entire lot is fixed. In this class belong Königsberg, Danzig, Spandau, Potsdam, Brandenburg, Frankfort-on-Oder, Breslau, Görlitz, Liegnitz, Halle, Altona, Kiel, Flensburg, Dortmund, Galzenkirchen, Bochum, Frankfort-on-the-Main (inner city), Duisburg, Elberfeld, Bonn, Remschied, München-Gladbach, Solingen, Rheydt, Neuss, Cologne, Bonn, Mülheim-on-the-Rhine, Aachen, Coblenz, Saarbrücken, Karlsruhe, Constance, Darmstadt, Offenbach, Worms and Brunswick, as well as, generally, the Bavarian cities.[29]

"A still greater use of the lot for building (and indeed to four-fifths) is allowed in Giessen, Lübeck, Mühlhausen-in-Alsace and Metz.

"A lesser use of the lot than in the foregoing cities (and indeed up to seven-tenths) is provided in Stettin, Posen, Bielefeld (in the case of lots inside the old walls), Bautzen. Up to two-thirds may be covered in Bromberg, Königshütte, Gleiwitz, Beuthen, Magdeburg, Erfurt, Hanover, Harburg, Lüneberg, Münster, Hagen, Oberhausen, Munich, Zittau, Rostock, and in the duchy of Anhalt. Up to half may be so used in Charlottenburg, Schöneberg, Rixdorf, Deutsch-Wilmersdorf, Lichtenberg (in so far as these five cities lie outside the ring railroad and so far as building Class 1 is concerned).

"In a number of cities the amount of lot that may be covered is so fixed that the lot is divided into strips. This is true, for in-

[29] In Görlitz and Liegnitz in the case of lots whose depths from the neighboring border does not exceed 35 meters.

stance, of Berlin, Charlottenburg, Schöneberg, Rixdorf, Deutsch-Wilmersdorf, Lichtenberg (so far as these cities lie within the ring railroad). The first strip that, measured from the building line, extends to the depth of 6 meters may be fully covered; the second strip, that extends to a depth of 32 meters, may be built over in Berlin to the extent of seven-tenths, in the rest of the above named cities, of sixty-five hundredths, of the lot. A similar division into strips, although to different limits, exists in Osnabrück, Cassel, Wiesbaden, Dresden.

"In Essen the amount of the lot that may be covered is fixed with relation to the number of stories. Thus in Zone 1, with two and three story houses, 75 per cent of the surface, with four-story houses 70 per cent, may be built over. In a few other cities (Solingen, Bonn, Mülheim-on-the-Rhine) in certain zones the extent of surface that may be built over is dependent upon height.

"In Stuttgart, Ulm, Heilbronn, Freiburg, Pforzheim, Heidelberg, minimum requirements exist only with regard to the height, while actual provisions with regard to the amount of the lot that may be covered are lacking. There are in them all provisions with relation to the distance between front and rear buildings; also 'must a certain amount of the lot, with a given relation to the height of the buildings, remain uncovered.' . . . In Ulm, 'in Class 1 of the new building lands, a court must be left behind the front building equal to half the height of its rear side.' . . .

"In Freiburg a portion of the lot, undivided and in one piece, of at least 50 square meters must be left free of buildings when there are buildings of three or less stories upon it, and for every additional story 20 square meters more are required. Pforzheim demands a court of 30 square meters by 3.60 meters least breadth; Heidelberg, one of 60 square meters.

"In the cities that, in addition to provisions with relation to the proportion of the lot that may be covered, have at the same time rules with relation to the size of the court, the least surface that is demanded is, in the majority of cases, given,—sometimes in terms of minimum square surface, while other cities simply give the minimum breadth or length of the court. In general a court of about 40 square meters is required by Danzig, Stettin, Görlitz, Liegnitz, Dortmund, Aachen, Coblenz, Bautzen; 30 to 36 square meters are required by Posen, Cassel, Harburg, Bielefeld, Oberhausen (for lots of less than 108 square meters), Rheydt, Neuss; 50 square meters are required in Spandau, Potsdam, Brandenburg, Frankfort-on-Oder, Halle, Remscheidt (for lots of less than 200 square meters), Dresden. Berlin demands a minimum court of 80 meters least dimension. In Magdeburg, in the old city, a free uncovered court of 10 by 10 meters minimum measurement must be left. . . .

"The provisions found in the building ordinances, with regard to

dwelling rooms relate first to their clear height, and their windows. . . .

"Some of the building ordinances . . . especially those here treated of, contain definite provisions with regard to the minimum size of rooms to be constructed. So in Breslau all dwelling rooms must have a floor area of at least 5 sq. m., in Görlitz and Liegnitz, an area of 7 sq. m. with a breadth of 1.80 m., in Magdeburg a minimum width of 1.80 m. Cassel and Wiesbaden require 7 sq. m. of area, with from 2 to 1.80 m. least dimension. Düsseldorf, an area of 10 sq. m. with a least dimension of 2 m. The Saxon cities have, for the most part, the requirement that every family dwelling must have one room that may be heated, and sleeping rooms; and the rooms, in several cities, must have a combined area of 30 sq. m. In Altona this combined area must be at least 40 sq. m. The Baden building ordinance prescribes floor area of 10 sq. m. for every room used for the prolonged stay of men. Mannheim, however, requires more, i. e., for the kitchen 12 sq. m. of floor area, and for the other rooms, 15 sq. m. Finally Mühlhausen (in Alsace) requires dwelling and sleeping rooms to have an area of 8 sq. m. and a width of not less than 2.20 m. Several cities prescribe a minimum floor area for servants' rooms only (Königsberg, Posen, Bromberg). In Königshütte, Gleiwitz and Beuthen every inhabited room must have an air space of at least 10 cb. m. The clear height of dwelling rooms in the Baden cities is fixed at 3 m.; in the Prussian cities at 3 m.[80]

"The Bavarian Building Ordinance prescribes for the Bavarian cities 2.70 m., the Saxon Building Law for the Saxon cities 2.85 m.; the Württemberg cities require a clear height of at least 2.50 m. In the Hessian cities the clear height is variously fixed; Offenbach requires 3 m., Worms 2.40 m., Hamburg 2.50 m., Bremen 2.75 m., Lübeck 2.60 m., Mühlhausen and Metz 2.80 m., Colmar 2.60 m.

"For dwelling rooms in the roof story, and often also for dwelling rooms in cellar stories, especially in the cities that prescribe for dwelling rooms generally 3 m., lesser heights are as a rule allowed.

"The size of window surface in the cities here treated of is in general regulated in two ways; either the window must bear a certain relation to the floor surface of the room, or the cubic content for each square meter of window surface is fixed. The relation of window surface to floor area is generally a tenth. An eighth is required by Stettin, Posen, Magdeburg, Hanover, Lüneburg, Dortmund, Hagen, Düsseldorf, Essen, Barmen, Crefeld, Cologne; a twelfth by Meissen. Those cities which for 1 sq. m. of window surface require a given cubic content of the room in question, demand generally 30 cb. m. of content for 1 sq. m. of window surface. In Aachen

[80] With, however, many exceptional cases, where less is usually required.

it is 20 to 1; in Munich, Gladbach, 50 to 1. Often the requirements for roof and cellar dwellings are less. A number of cities have no provision with regard to the proportion of window surface to floor area or cubic content of rooms.

"Roof dwellings as a rule must be located only immediately over the topmost story, and under the roof beams; but not one over another. In addition the construction of dwelling and sleeping rooms in the roof story is invariably subject to a number of further provisions, especially with regard to the greatest height of the floor of the roof story above the ground, and the construction of stairs leading to the roof story. . . .

"For dwellings and dwelling rooms in the cellar story, when not forbidden entirely, the provisions almost universally are with regard to the distance of their floors from the surface of the earth and their elevation above high water mark. As a rule the floor of cellar rooms must not . . . be more than 50 c. m., under the surface of the earth, and must be at least 30-40 c. m. above high water mark. . . . In a number of cities cellar dwellings are forbidden, but the construction of single dwelling, sleeping or working rooms is allowed under certain conditions. . . .

"Most of the Saxon cities provide that for every apartment there shall, as a rule, be a toilet. In Harburg and Lüneburg there shall be a toilet for every two apartments. In Hanover, for every three apartments. In Dortmund, Gelsenkirchen, Bochum, Hagen and the cities in the district of Düsseldorf, in Cologne, Bonn, Mühlheim-on-the-Rhine, Aachen, Coblenz, Munich, Würzburg and Brunswick, there shall be a toilet for every dwelling house. In Hamburg there shall be a toilet for every twelve, in Strassburg (in Alsace) for every fifteen persons. . . .

"The regulations for boarding houses are divided into those which regulate the air space and floor area for lodging house keepers and lodgers, and those which regulate them for lodging house keepers only. . . . In most cities an air space of 10 cb. m. with a floor area of from 3 to 4 sq. m. is required. . . ."

No. 2. The Frankfort Building Ordinances

The principal building ordinances of Frankfort are two in number. The first, often referred to as *the* building ordinance, applies to the entire city; the second applies only to the "outer" city, as the city outside the "old" or "inner" city is called, and is, as a rule, more restrictive in those matters to which it relates than the first ordinance, and therefore in these matters practically superseded the first ordinance in this outer city. Thus the first ordinance serves a double purpose; it is in certain matters the uniform rule for the entire city,

and in others is practically the ordinance for the inner zone; while the second ordinance is the zoning ordinance for the rest of the city.[31]

A translation of those parts of these ordinances of most interest to city planners in this country, and a summary of the remainder, follows.[32] In addition, in another note an official table setting forth in condensed form for purposes of comparison the principal zoning provisions for the entire city, with a similar statement of the zoning regulations of Karlsruhe, Munich and Cologne, and the Düsseldorf regulation in detail, are given.[33]

Building Ordinance for the City of Frankfort-on-the-Main

I

BUILDING PERMITS, EXEMPTIONS, APPEALS

* Secs. 1-6.

A building permit is required from the building police[34] for the erection of every new building, temporary or permanent, and every addition, reconstruction or substantial repair to an existing building; for every change in the use of buildings, front-gardens and side setbacks; for every destruction of buildings or parts of the same; for enclosures; for electrical and gas connections, etc.

In applying for a permit, drawing, etc., must be submitted.

The owners of adjoining lots must be given notice of all but strictly internal changes and may maintain objections if their rights are invaded.

The building police has the power to grant all the exceptions to and exemptions from the provisions of the two building ordinances. provided for in them.

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* Summarized.

[31] The authority for passing these ordinances will be found in secs. 5 and 6 of the (Prussian) ordinance of September 20, 1867, "über die Polizeiverwaltung in den neuerworbenen Landestheilen"; and secs. 143 and 144 of the Prussian Statute "über die Allgemeine Landesverwaltung" of July 30, 1883. The Frankfort ordinances will be found in the Frankfort *"Anzeige Blatt der Städtischen Behörden,"* 1912, p. 533; 1910, pp. 351, 1093; 1911, pp. 81, 194, 564, 718; 1912, p. 487. The official edition of these ordinances, with numerous appendices, and a map, is printed and sold by Gebrüder Knauer, Frankfort.

[32] An amendment, adopted December 18, 1918, gives the building authorities power to allow numerous exemptions from the provisions of the ordinances for a limited period on account of the housing shortage due to the war. These exemptions permit cheaper construction, with more intensive occupancy.

[33] See pp. 251 ff. and 262 ff.

[34] In Frankfort the executive branch of the City Council (Magistrat) is constituted building police.

The doings of the building police are subject to exception and appeal.[35]

II

INSPECTION

* Sec. 7. *Inspection before Occupation.*

III

MISCELLANEOUS

1. Street and Building Lines, etc.

* Sec. 8. Before the erection of structures, etc., the building and street lines, grades, etc., must be fixed. Encroachments may be permitted for a fixed period, or until permit for same is revoked. Setbacks may be permitted if exposed walls are finished like façades. Subsidiary buildings must be placed in the rear, or those parts visible from the street, finished like façades.

2. Setback of Buildings from Side Boundary and Each Other

* Sec. 9. When, within the depth of a new building, addition to an existing building, etc., to be erected on the lot in question, there is no building on the neighboring lot, then the new structure may be placed either immediately on the boundary or with a setback from it of at least 2.50 m.; except that, if that neighboring lot is less than 3 m. wide, the setback must be at least 2.50 m.

When, within such depth, there is a building on the neighboring lot, located on the boundary, then the new structure must be erected on the boundary or with a setback of at least 5 m. from it; if this neighboring building is set back 5 m. or more, the new structure may be on the boundary; if less than 5 m. that setback must be 2.50 m.

Buildings on the same lot must be erected either against one another, or with a space of at least 5 m. between them.

There are certain exceptions and modifications with relation to rear buildings, buildings apparently not permanent, buildings not more than 5 m. in height to ridge pole, and where hardship would be caused.

In so far as a side wall is visible from the street it must be finished as a façade and not left rough.

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* Summarized.

[35] See the Allgemeines Landesverwaltungsgesetz (Prussia) of July 30, 1883 (especially secs. 127-131, 133) (Gesetz Sammlung, p. 195), and sec. 145 of the (Prussian) Zuständigkeitsgesetz (Gesetz Sammlung, p. 237).

3. *Court Space*

SEC. 10.

* 1. New structures shall not cover more than ¾ of the lot back of the building line; but on corner lots improved with one building ⅚ is allowed. Areas not built over, which from situation or shape are useless for light and air, shall not be reckoned as part of free area. The projection of cornices to 50 cm., light and air shafts, steps to ground floor height, verandas not to exceed 12 sq. m., etc., into or over the prescribed court is allowed.

2. Lots which on July 15, 1884, were already more intensively built, may (without prejudice to the provisions of sec. 33), by way of exception be built up again to the mass of the existing buildings, when a suitable development of the lot is not otherwise possible. Small out-buildings of one story are by exception permitted beyond the area already built over when conditions as to light, air and safety from fire are not thereby made worse.

In the case of lots of little depth, and especially of narrow lots between two streets, all court space may by exception be omitted if the windows of all dwelling and sleeping rooms give on the street, and provision is made for sufficient light and air in kitchens, halls, stairs and toilets.

These exceptions, however, are permissible only when the street on which the lot abuts has a width of more than 8 m. and cannot be granted at all for the built up parts of lots, less intensively developed, that were subdivided after July 15, 1884.

3. When the ground story is used for stores, store rooms, and similar business rooms, together with subsidiary rooms, then the lot, to ground story height, may be built over, up to the entire area of the lot, if the area covered by the upper stories is diminished accordingly. Under the same conditions the built up area on the upper stories may, with the consent of the building police, be proportionately increased.

The greatest permissible cubic mass of structure resulting from the area that may be covered (sec. 10) and the permissible height (sec. 11) shall in no case in the aggregate be exceeded.

4. In the case of rear buildings, dwellings for more than three families shall be provided for only when 5/10 of the entire lot remains uncovered. Exceptions are permissible under favorable court conditions.

5. Every court must be provided with an entrance sufficient in the judgment of the building police.

6. When for the purpose of gaining the court area prescribed above, parts of a neighboring lot already built up are joined to the building lot in question, then these parts so added can be taken into

* Summarized.

account, in favor of that lot, only when by reason of the diminution of the court area of the neighboring lot, it is not reduced below the prescribed size.

4. Building Heights

SEC. 11.

(a) Buildings on the Street

1. The height of a building on streets of less than 9 m. in width, must not exceed 11 m., on wider streets must not exceed the street width by more than 2 m. and in no case shall exceed 20 m.

A building height not to exceed 3 m. more than the street width can, as an exception, be allowed on streets of the width of 9 m. and more when this greater height is not used to construct an additional story not otherwise permissible.

2. In dead end streets the height of the building closing the street is governed by the width of the street at the façade line of the new building.

3. In the case of corner lots on streets of different width, the width of the wider street fixes the building height also on the narrower street; but only for an extent of façade which does not exceed twice the width of the narrower street; and in streets of less than 8 m. not more than 12 m.; and in no case more than 20 m. Corner lots are such as abut on at least two streets, and of which the street (or building) lines enclose an angle of at most 135 degrees.

4. In the case of buildings between two streets, corner houses, and so-called house islands on streets of varying width, a single average height for all façades may be allowed instead of different heights.

* 5-7. Rules for measuring, height, etc. By "height" is meant, generally, height to principal cornice.

8. The court façade of a building shall not exceed the height prescribed for its street façade, or the height of walls permitted by sec. 33, if this is less than the permissible building height.

If the width of the court, measured perpendicularly to the façade, is materially more than the width of the street, and light and air conditions are particularly favorable, then as an exception a greater height of court façade may be permitted.

(b) Buildings on Courts (Rear Buildings)

1. The height of a rear building on a court of less than 6 m. in width shall not exceed 8 m., and on a court of greater width shall not exceed the width of the court plus 2 m. In other respects the provisions of (a) 1-5, of this paragraph apply, the average width of

* Summarized.

all court areas situated in front of the rear building, up to a maximum depth of 20 m. controlling, instead of the street width.

* 2. Rules for Measuring Height.

3. One story buildings which are not higher, to the ridge pole of the roof than 5 m. and which do not cover with buildings more than 25 sq. m. may be excluded in calculating court width.

(c) Exceptions

1. When the application of the above provisions to new buildings on lots which have already been built up might cause a considerable diminution in the value of the lot, then, as an exception, the new buildings may be allowed to attain the height of the old buildings.

2. For vertical projections which are intended only for ornament or which, because of the special purpose for which they are intended (e. g., water towers, silos, etc.), absolutely require a greater height, a greater height may, as an exception, be permitted, within the total length permitted by sec. 12, no. 6.

3. The right to grant exceptions for churches, public buildings, as well as monumental private buildings, is also reserved.

5. *Roofs and Vertical Roof Projections*

SEC. 12.

1. The height of the roof must not exceed the permissible height of the building by more than half the street width, and in no case by more than 9 m. In the case of streets less than 10 m. in width, a height of 5 meters is permitted.

2. The slant of the roof shall not exceed an angle of 45 degrees, whose apex lies at the point of intersection of the line of permissible building height and the building line. Within the permissible height it shall not exceed an angle of 80 degrees.

For roofs on courts the permissible height of walls on courts, in accordance with sec. 33, takes the place of the height of the building, if this wall height is less than the permissible building height.

The inclination of the roof above the break in the roof, except in single family houses, shall not in general exceed the angle of 45 degrees; and in dwelling houses the room over the joists is to be so arranged that its use for dwelling purposes for any length of time is impossible.

3. On streets wider than 13 m., for the roof giving on the street, a steeper angle is allowed within the quadrant, whose radius is not more than one-third the width of the street, and in no case more than 9 m.; and whose middle point is at the permissible building height. The projection of the chief cornice may be outside this quadrant.

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* Summarized.

4. The roof of a corner house, situated on streets of different widths, can attain on the narrow street, for a length of façade which does not exceed twice the width of the narrow street, that height and angle which is allowed on the wider street. On streets, however, of less width than 8 m., this length of façade shall not be more than 12 m., and in no case more than 20 m.

5. For the roof of a building situated behind the building line, the building police may allow a correspondingly greater height and a greater diameter.

6. The total length of the projections above and behind the permissible roof, like gables, roof windows and the like, must not exceed half the length of the façade in question. In so far as they are situated above the break in the roof they are permissible only on special license.

7. The right to make exceptions in the case of churches, public buildings, monumental private buildings, etc., is reserved.

8. A permit, revocable at any time, may be given for signs attached to the building, projecting from the roof, illuminated advertising devices, and the like.

The right is reserved to make special provisions with regard to their erection, in each case, in accordance with special local conditions.

6. Projections

* Secs. 13-16. As a rule projections over the building line are allowed only on special permit from the building police, which is at all times revocable. There are, however, certain projections which, subject to the rights of the city as owner of the street, the building police may allow as a matter of routine; such as steps, pilasters, and other ornamentation, signs, marquises, open and closed balconies, etc. The distance that the projection may go beyond the building line, the mass of projection in proportion to the width of the building, and the distance from the neighbors' boundary, are limited. Thus open balconies and piazzas must be at least 3 m. above the sidewalk and 2.50 m. from the neighboring boundary, unless the neighbor consents to a less distance; their projection must not exceed 1.50 m.; and their area must not exceed the product of ⅓ the length of the façade, by ⅒ the width of the street, or at most 1.50 m.

Only signs that are not grossly disfiguring shall be affixed to front garden enclosures. Projections beyond the front garden line are allowed, much as projections over the building line are permitted.

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* Summarized.

7. *Overhangs*

* Secs. 8-16. *Structural Provisions.*

* Sec. 17. Stories of buildings overhanging the building line must, as a rule, be done away with when reconstruction occurs.

* Secs. 18-30. Provisions with regard to strength and choice of material, protection against fire, necessary stairs and exits, inspection before occupancy, etc.

17. *Construction of Dwelling and Work Rooms Kitchens and Toilets*

(a) Number and Situation as to Height of Stories for Residence

Sec. 31. Dwelling houses, in addition to the ground story, shall have not more than four stories and the roof story; independent rear, side and transverse buildings shall have not more than three stories in addition to the ground story and the roof story. Dwellings in the roof story are not permitted in houses with five stories. Exceptions may be allowed on special permit, at all times revocable, for janitors' dwellings; which shall comprise not more than two rooms, with kitchen and incidental rooms.

(b) Height of Dwelling. Sleeping and Work Rooms and Kitchens

Sec. 32.

1. Dwelling and sleeping rooms, as well as kitchens, must in the roof story have a clear height of 2.60 m.; in the other stories of 3 m.; wash rooms, as a rule 2.50 m.

2. For rooms intended for the stay of many human beings the building police may prescribe a greater height.

(c) Lighting and Ventilation

Sec. 33.

1. All dwelling, sleeping and work or business rooms (in which store rooms are included, if human beings are employed in them for any considerable length of time) as well as all kitchens and toilets, must be provided with windows which make possible a sufficient lighting and ventilation of the rooms.

The size of the windows, with the exception of toilet windows, shall be at least 1 sq. m. for every 30 cb. c. m., capacity of the rooms; and in the roof story, 1/2 sq. m. to 30 cb. c. m.

2. The windows must receive air and light either immediately from the street or from a court (garden); and in the latter case the following provisions shall be observed:—

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* Summarized.

The windows of dwelling, sleeping, and work or business rooms, and kitchens, must not be opposite a wall higher than $\frac{n \times d}{4}$ or $\frac{n \times a}{p}$, when

a equals the surface area, in square meters, of the court or garden lying before the window wall in question;

d equals the distance of the wall, measured at the middle of the window, in meters;

p equals the periphery of the court or garden, in meters;

n equals 6 in the inner city;

n equals 5 in the outer city.

The builder has his choice between these two formulæ. The height is measured from the under surface of the window lintel, or if this is higher than the under surface of the ceiling of the room to be lighted, from the under surface of the ceiling, to the upper surface of the chief cornice of the wall lying opposite.

3. When the window is situated opposite the boundary of the neighboring lot, that lot (subject to the provisions of 7 and irrespective of whether or how that lot is built up), is considered as built up with a party wall whose height is equal to the greatest height permissible under sec. 11a for a front building on the neighboring lot. When, however, the boundary is not built up with a party wall and, according to building police regulations, cannot be so built up, then it is to be considered that there is a party wall opposite on the neighboring lot built to the height and with the side setback prescribed as aforesaid by the building police regulations. If the wall of the building in which the window is to be placed is lower than the wall opposite, then half the difference in height shall in the above calculation be deducted from the height of the opposite wall.

4. The court situated in front of the windows must measure, at the height of the floor of the room, at least 15 sq. m.; the distance of the wall lying opposite, at least 4 m. in the inner city, and 5 m. in the outer city; and the court measurement parallel to the window, at least 3 m.

5. In reckoning the area and the periphery, parts of the court may be left out of the reckoning when the reckoning is not for a window which gives on the part of the court to be so left out.

6. If a room has windows which fulfil the above requirements, more windows may be constructed without restriction.

7. When neighboring courts are united and security is given to the municipality of the permanence of this union, then the combined area and the combined periphery of the united courts, respectively, the distance to the neighboring walls may be taken in calculation; but in this case in the formulæ, for n instead of 6, 5, shall be taken; and instead of 5, 4.

Both numbers are to be reduced to 3, if the windows serve for

rooms that in whole or in part are situated more than 20 m. behind the building line.

The least setback of the windows from the boundary must, however, in all cases equal 2.50 m.

8. Rooms which are so situated that they can be lighted immediately from above may be lighted by skylight, when arrangements are made which in the opinion of the building police safeguard a sufficient circulation of air and when the clear size of the skylight is equal to at least ⅛ of the floor surface of the room to be lighted.

9. In cases in which, in the opinion of the building police, the fulfilment of the provisions of this paragraph would cause unusual hardship, especially in the case of lots that on April 1, 1912, were already built up, the building police may allow appropriate exceptions to such provisions when the conditions as to light and air are in other respects favorable.

10. Windows in toilets are permitted to give on a court (garden) only when the court (garden) has, with a least dimension of not less than 2.50 m., an area of at least 10 sq. m. (comp. however sec. 37, no. 5).

(d) Rooms in Cellar

SEC. 34.

* PARS. 1-5. Dwelling rooms not allowed, and other rooms where human beings are employed for any length of time only if of a minimum clear height of 2.80 m. with ceilings at least 1.50 m. above surface, windows a height of at least 1.20 m. and floor at most 1.30 m. below surface. Exceptions allowed for certain industries, and janitor's quarters in public and pretentious private buildings. if comprising not more than two rooms, with kitchen and other accessories.

(e) Dwellings on Ground Floor

SEC. 35.

1. The floor of dwellings on the ground floor must be situated at least 50 cm. above the paved surface of the street and the adjoining land.

2. If, however, there is a cellar or air space under the floor, a height of at least 30 cm. above the street surface and the adjoining earth is permissible.

3. If the court slopes down, the construction of dwellings on the ground floor at a less height of floor may under otherwise favorable conditions, as an exception, be authorized by the building police.

(f) Dwelling and Living Rooms in the Roof Story

SEC. 36.

1. Dwellings and single dwelling rooms in the roof story are allowed only under the joists.

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* Summarized,

2. The floor of dwelling rooms in the roof story must not be situated more than 30 cm. above the permissible building height.

* PARS. 3-10. Structural provisions.

(g) Toilet Rooms and Bath Rooms

SEC. 37.

Every apartment, as a rule, must have a separate toilet, with a window on the outer wall of the house; and an area of at least 1 sq. m.

(h) Safety from Fire (sec. 38)

*18-25. *Structural Provisions (secs. 39-49)*

* 26. *Construction of Theatres, Circus Buildings, and Public Assembly Rooms*

* SEC. 50. For the above mentioned structures, in addition to the provisions of the building ordinance, the ordinances issued from time to time by the district police apply.

*	IV.	COMPLETION AND MAINTENANCE OF BUILDINGS (secs. 51-52)
*	V.	ELECTRICAL APPLIANCES (sec. 53)
*	VI.	GAS CONNECTIONS (secs. 54-56)
*	VII.	ENCLOSURES AND FRONT GARDENS (secs. 57-63)
*	VIII.	SPECIAL PROVISIONS FOR SINGLE DISTRICTS (secs. 64-65) [36]
*	IX.	PENALTIES (sec. 66)
*	X.	REPEALS (sec. 67)

POLICE ORDINANCE, OF APRIL 8TH, 1910, WITH REGARD TO BUILDING IN THE OUTER CITY, FRANKFORT-ON-THE-MAIN

† BOUNDARIES OF THE OUTER CITY

Sec. 1

DIVISION INTO ZONES AND DISTRICTS

Sec. 2

I. In the outer city including the former rural administrative district,[36a] the following districts and zones are created:

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* Summarized.
† Omitted.
[36] See p. 215.
[36a] This district, shortly before 1910, had been taken into the city. It consisted partly of open country, partly of scattered villages.

1. Residential districts which are especially devoted to residential uses and in which a quiet residence shall be assured.

2. Mixed districts which shall serve equally for residence and industry.

3. Suburban house districts which are intended for an open villa-like development.

4. Factory districts in which industrial enterprises shall be facilitated and, as far as possible, brought together.

II. In the residential districts and in the mixed districts are created:

1. An inner zone.

2. An outer zone.

3. A rural district zone.

III. The divisions of the districts and the zones run, as a rule, through the middle of the streets as constructed or proposed. In so far as the boundary lines cut through lots the provisions governing the district or the zone in which the street front of the lot lies control the building up of the lot; and in so far as the boundaries cut through the street frontage, the provisions governing the zone and district in which the greater part of the street front lies, are controlling. If, however, one part of the lot is situated in the mixed district and another in the residential district, then the building up of the lot in accordance with the provisions of the mixed district is permissible only when the part situated in the residential district is not more than a quarter of the entire lot.

Sec. 3

The boundaries and zones appear in detail on the map which is a part of this ordinance.

A copy of the map on a larger scale is on exhibition at the office of the building police. On the map are marked,

I. Residential districts:

1. Of the inner zone with A.

2. Of the outer zone with B.

3. Of the rural district zone with C.[37]

II. Mixed districts:

1. Of the inner zone with D.

2. Of the outer zone with E.

3. Of the rural district zone with F.

III. The suburban house districts with G.

IV. Industrial districts with H.

V. The inner city with I.

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[37] See note 36 on page 237.

SIDE SETBACK

Sec. 4

I. *Side Setback.* 1. *Size*

New buildings, additions and changes which in the judgment of the building police equal in extent new construction must in residential districts be erected with a setback from all neighboring boundaries which in the inner zone shall equal 3 m.; in the outer zone, the rural district zone and the suburban house district, 4 m. In the mixed districts of the inner and outer zone which by the city plan are provided with front gardens, a setback also of 3 m. is in the case of front buildings to be observed.

Buildings and groups of buildings on the same lot must preserve a setback from one another twice that provided in par. 1; but for sheds and other subordinate buildings a setback of 5 m. is sufficient when their area does not exceed twenty-five sq. m. nor their height, to the ridge of the roof, 6 m.

2. *Use*

The space between buildings which is not to be built over must not be used for industrial purposes, or storage. With the exception of the necessary exits and entrances this space must to the depth of the front house be laid out and maintained in a suitable manner as a garden.

II. *Exceptions*

To the provisions of I, 1 there are the following exceptions:

1. *Party Walls*

* When there is a party wall existing on the boundary of the neighboring lot, the new structure on the lot in question may to the depth of the existing wall be built immediately against it; but if not so built must be located with a setback from the neighboring boundary of twice that fixed in I, 1, above.

When the neighboring party wall on the boundary either begins at the building line or is at least half the depth of the existing building, then the wall of the new building on the boundary may extend back from the building line not more than 18 m., even if the neighboring party wall does not go back so far. In the residential and mixed districts of the rural district zone and in the suburban house district, the limit is 15 m.

* Summarized.

The party wall of the new building may be broken by courts only when in the judgment of the building police this is expedient.

2. *Groups of Buildings*

a. Groups of buildings are allowed in the parts of the mixed districts specified in I, 1, and in the residential district of the inner zone, with an unbroken street front of at most 80 m., in conformity with the provisions as to party walls mentioned in 1.

This extent is permitted to the entire depth of the group of buildings.

For the purpose of erecting a permissible group of buildings, a house may be built with a party wall on the boundary of a lot, the lot next to which is not built up. In this case a party wall may be erected to a depth not to exceed 18 m. or, in the rural district zone 15 m. Courts breaking the wall must conform to the provisions of II, 1.

b. In the residential districts of the outer and rural district zones groups of buildings in accordance with the provisions of *a*, are on permit allowed; with the further condition that the buildings to be erected are adapted in dimensions to those already existing or authorized, and that any portion of party walls remaining visible shall be finished like façades.

c. In the suburban house district at most two houses, in accordance with the provisions of *b*, may on permit be built against one another to a depth of party wall of 15 m.

d. With the consent of the executive board of the city council[38] still longer groups may be built when, by the disposition of the open spaces, especially the spaces between buildings, the access of sufficient light and air for the interior of an entire block surrounded by streets is secured, and the solid building of the entire block is avoided.

e. For single family houses—i. e., houses which with ground story and at most two other residential stories, are constructed for the residence of only one family and under these conditions licensed by the building police—a street front of attached houses not to exceed 150 m. in length may be permitted.

* III. *Building in or over the Setback Space between Buildings*

Side projections are allowed much as projections over the building line and over the front garden line.[39]

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* Summarized.

[38] "Magistrat."

[39] See the first ordinance, sec. 13 on p. 233.

IV. *Setback for Offensive Industries*

1. Buildings which are erected, enlarged, fitted up or used for the conduct of factories, workshops, industries which cause noise, or fire hazard, or are offensive on account of smoke, soot, bad smell, or other special reasons, must be located at a distance on all sides from the boundaries of the lot and from the street as follows: in the residential district of the inner zone at least 20 m.; in the residential district of the outer zone in the rural district zone and in the suburban house zone, at least 40 m.

By obtaining a license, relief may be obtained from the application of this provision on principal traffic streets in residential districts for the erection of small bakeries, pastry shops, butcher shops and similar small business enterprises.[40]

2. The setbacks mentioned in 1 are also to be observed in the case of stables and bowling alleys. For the latter less onerous conditions may be granted if they are fitted up for noiseless operation.

Private stables and their manure piles shall set back at least 5 m. from all neighboring lot lines, and be ventilated, to the satisfaction of the building police, from the roof. With the permission of the adjoining owner, such stables may be located with an outer wall on the lot line.

3. In the mixed districts buildings which are erected, enlarged, fitted up or made use of for the prosecution of enterprises which, under sec. 16 of the National Industrial Ordinance,[41] require a special license shall keep a setback of at least 10 m. on all sides from the boundary of their lot and from the street.

HEIGHTS OF BUILDINGS AND NUMBER OF RESIDENTIAL STORIES

Sec. 5

I. 1. *Width of Street*

By street width is meant the space between the established street lines, or, on streets with front gardens, that width plus 2/3 of the depth of the front garden.

Areas of water, escarpments, quays, railroad rights of way, etc., are reckoned as parts of the street in calculating its width; but parks and similar public open spaces which immediately adjoin the street, are not so reckoned.

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[40] This clause was added by police ordinance of May 21, 1912.
[41] See p. 210.

2. *Heights of Buildings, Front Buildings*

Buildings on the street may, on streets up to 9 m. in width be in all cases 9 m. high; in other cases not higher than the street is wide. (comp. I, 1.) In no case may buildings exceed in the residential and mixed districts of the rural district zone, 16 m.; in the residential districts of the outer, and the inner zone, 18 m. Residential buildings may not in any case exceed 18 m. in height.

In the industrial district the height of warehouses, factories and business houses may exceed the street width by not more than 2 m., but may in no case exceed 20 m.

3. *Rear Buildings*

The height of independent rear buildings shall not exceed the average depth of the court. In the case of existing rear buildings, the average depth of court lying before them shall not, by the erection of additional structures be made less than equal to the height of the rear buildings. Space occupied by buildings in the required open space at the side of buildings and in court areas, to the height of the ground story, are in this connection reckoned as court area.

The greatest permissible height of rear buildings is in the residential and mixed districts of the inner zone and in the mixed district of the outer zone, 13 m.; in the residential district of the outer zone and in the residential and mixed districts of the rural district zone, 9 m.; in the suburban house district, 6 m.

4. Where the building lot slopes up or down, the building police is authorized to decide from what point the height of the building is to be measured.

II. *Number of Stories.* 1. *Front Buildings*

For front buildings the number of permissible stories is:

a. In the residential and mixed districts of the inner zone, four stories and roof story.

b. In the residential and mixed districts of the outer zone, with a width of street (comp. I, 1) of at least 14 m., three stories and roof story; with a less width of street, two stories and roof story.

c. In the residential and mixed districts of the rural district zone, with a width of street (comp. I, 1) of at least 18 m., three stories and roof story; with a less width of street, two stories and roof story.

d. In the suburban house district, two stories and roof story.

2. *Rear Buildings*

For a rear building no greater number of stories is permissible than is allowed for the front building to which it is related and at most:

a. In the residential and mixed districts of the inner zone and in the mixed district of the outer zone, three stories and roof story.

b. In the residential district of the outer zone and in the residential and mixed districts of the rural district zone, two stories and roof story.

c. In the suburban house district, two stories and roof story; but rear buildings containing independent dwellings for rent are forbidden.

3. *Factory District*

In the factory district the number of stories is not limited. Dwellings are permitted only for the owner or for employees, and, on each lot, only one such dwelling.[41a] The erection of a larger number of dwellings on the lot where the factory, warehouse or business house stands, is allowed only when court conditions with regard to light, air, access, etc., are favorable and for employees whose permanent presence on the lot, owing to the nature of their employment, seems essential.

The factory districts on the Hanauer Landstrasse are governed also by the provisions of sec. 12, VI.

* III. *Roof Stories*

In buildings with not more than three stories (exclusive of roof story) the entire roof story may be used for residence. In buildings with more than three stories only one such apartment may be constructed in the roof; and that apartment shall not embrace more than half the floor area of the roof story. Exceptions may be allowed for buildings in existence April 1, 1910.

Single rooms for residence, auxiliary to residential apartments in other stories, may be constructed over the joists in one family houses, and in other houses on condition that the number of stories otherwise permissible be lessened by one. Such rooms may also be authorized by the executive branch of the city council for houses with two stories (exclusive of roof story) in block construction in accordance with sec. 4, II, 2, *d.*

IV. *Cellars*

In cellars the ceiling shall not be situated higher than 2.50 m. above the sidewalk or the surrounding ground. The independent use of cellars by the construction of stores and restaurants is forbidden.[42]

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* Summarized.

[41a] This provision was introduced by amendment in 1912.

[42] *Ibid.*

ACCESS AND LOCATION OF REAR BUILDINGS

Sec. 6

I. *Passage Way*

1. When independent rear buildings with dwellings in them are constructed or when a front house is built on a lot where such rear buildings already exist, then a free passageway from the street at least 3 m. wide and 3.20 m. in the clear to all the rear buildings, connecting with the sidewalk at grade, shall be constructed. This passageway shall be provided with pavement, drainage and light, and shall be permanently kept clear. In residential districts this passage must in every case be and remain unobstructed by buildings over it; in mixed districts it must be so unobstructed when more than one rear building or one rear building of more than two stories and of more than 130 sq. m. of ground area are on the lot.

2. Under unfavorable conditions and when several rear buildings with dwellings are erected or are in existence, the building police may, for protection against fire, require a broader or, if need be, a second passageway.

3. Exceptions to the provisions of 1, may, without prejudice to the provisions of sec. 27 of the Building Ordinance, be allowed by the building police for one family houses and under favorable circumstances, for houses that in accordance with the building plan are surrounded on two or more sides by streets or public parks or similar open spaces; and also for rear buildings which on April 1, 1910, were already in existence.

II. *Setback from the Street in Residential Districts*

Rear buildings must preserve the following distances from the building line of streets established by city plan even if not yet constructed:—in the residential district of the inner zone, at least 30 m.; in the residential districts of the outer and rural district zones and the suburban house district, at least 45 m. Exceptions in the case of blocks are allowed in accordance with sec. 4, II, 2, *d*.

III. *Dwellings for House Staff*

The provisions of I and II do not apply to dwellings for the house staff (coachmen, gardeners, and the like) in so far as such dwellings are erected on the same lot as that on which their employers have their residence; nor do these provisions apply to stables and carriage houses belonging to single family houses on the same lot.

UNCOVERED AREA

Sec. 7

I. *Size*

a. Structures in the residential and mixed districts of the inner zone shall leave uncovered at least 1/10, and of corner lots (comp. sec. 10 of the Building Ordinance) if built up with only one corner house, at least 3/10 of the lot situated behind the building line.

b. In the residential and mixed districts of the outer and rural district zone the open space shall be 5/10 and 4/10 of the lot.

c. In the suburban house district 7/10 of the building lot lying behind the street line, shall remain uncovered.

d. In the factory district, at least 3/10 of the building lot lying behind the building line, shall remain uncovered.

e. A lot running through the block from a street in the residential to a street in the suburban house district shall, in so far as the provisions of this ordinance with regard to courts are concerned, be deemed to be divided into two lots of equal depth, each subject to the court provisions of the district in which the street upon which it fronts, is situated.

II. *Additional open space.* 1. *More than One Apartment in a Single Story of a House*

If in one story of a house there is more than one apartment, then the requisite uncovered space for every such house is to be increased by 10 sq. m. If, however, one of these stories contains apartments with more than four rooms, then instead of this amount there shall remain open for every such story, in the residential and mixed districts of the inner zone an additional 1/20 of the building lot lying behind the building line; in the residential and mixed districts of the outer and rural district zones an additional 1/10. In the suburban house district, only one apartment is permitted in each story.

2. *Deep Houses*

If a front building has a depth in excess of 18 m., then the requisite open space is to be increased by a space equal to that part of the area that exceeds in depth the 18m. In reckoning the open area, the area of side setbacks that begin at the building line and exceed those required under Sec. 4, I, 1, is disregarded. In the mixed districts front houses and connected rear buildings are for the purposes of this provision considered as one house. In the resi-

dential and mixed districts of the rural district zone and in the suburban house district, the basis is 15 m. (instead of 18 m.).

In the residential districts of the outer and rural district zones and in the suburban house district the requisite enlargement equals once and a half the amount of the area of that part of the building which exceeds in depth 18 m. and 15 m. respectively.* [Here follow additional formulæ for fixing the increase of uncovered space.]

This subdivision shall not apply to buildings devoted entirely to industry in the mixed and factory districts.

3. *Rear Buildings*

When rear buildings are erected with more than three apartments, a further ⅒ of the building lot situated behind the building line shall be kept open.

III. *Exceptions*

1. For one family houses exceptions to the provisions of I and II, 2, may be allowed.

2. Where blocks are built in accordance with the provisions of Sec. 4, II, 2, *d*, the provisions of II, 1, sentence 1, and II, 3, may be waived; and buildings which contain philanthropic residential adjuncts may be disregarded in reckoning the area to be left free from structures.

3. If the court conditions are favorable, an exception may be allowed from the provisions of II, 1, sentence 1, II, 2, and 3 for buildings that were in existence or approved on April 1, 1910; also until March 31, 1912, for lots that on April 1, 1910, were already subdivided and for which the full application of the provisions would cause hardship.

4. By special license more of the area of the lot may be covered when by lessening the permissible building height (sec. 5) the cubic content resulting from the permissible height and the area built over, in accordance with the provisions of this paragraph, are not exceeded, and light and air conditions are favorable.

5. If the provisions of II, 1-3 both apply, then only that addition to the open space shall be made which gives the greater open space.

6. Exceptions to 7, I, *e*, may be allowed by the building police, under the conditions of sec. 12, II, E, *e*.

IV. *Use*

In the suburban house district, the area left open shall, with the exception of the necessary entrance walks and drives, be laid out and maintained as gardens and must not be used for storage.

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* Summarized.

DISFIGURING STRUCTURES, STABLES, ETC., IN THE RESIDENTIAL AND MIXED DISTRICTS

Sec. 8

I. Free standing buildings of more than two stories on public streets or squares shall not have a length of frontage of less than 8 m. For corner houses this provision holds on both street fronts.

II. Neither structures which in the opinion of the building police would be strikingly at variance with the character which by lay out and building development the street possesses, nor stables, barns, carriage houses, wash kitchens, outhouses and the like, shall be erected on public streets or squares. Exceptions may be allowed by the building police when these buildings in their opinion receive an appropriate architectural treatment.

III. The back and sides of a building which is erected so near the building line of a street that, in the opinion of the building police, necessary space for the erection of a building concealing such back or sides would not be left, must be given a situation suited to the building line in question and a suitable architectural form.

IV. Party walls that remain permanently visible from the street must be finished like façades.

BUILDINGS WITH TIMBERED CONSTRUCTION

* Sec. 9 (Structural provisions)

EXEMPTIONS FOR HOUSES WITH SMALL APARTMENTS

Sec. 10

1. For dwelling houses that fulfil the following conditions:

a. The houses must not cover more than 130 sq. m. of ground area, in which connection balconies, open verandas, etc., are not included.

b. They must not have more than three stories (exclusive of roof story).

c. They must not have any apartments in the cellar or basement.

d. The roof angle over the principal cornice to the joists must not exceed 70 degrees; that from there up, 45 degrees.

Moreover;

2. For one and two family houses with at most two stories (exclusive of roof story) there may be the following exemptions:

* Summarized.

a. The clear height of the stories may be reduced to 2.80 m.

b. The practicable depth of the stairs may, if in no story more than one apartment is situated on such stairs, be reduced, with winding stairs to 1 m.; with straight runners and landings to 90 cm.; and the width of halls to 90 cm.

c. Exceptions to the provisions of sec. 20 of the Building Ordinance with relation to strength and construction of party, façade, and partition walls, may be granted by the building police if the building will be sufficiently stable, fire resisting, and hygienic.

d. So also wood construction of verandas and the like may be permitted if no instability or fire risk exists.

e. In building groups, party walls of the strength and thickness as prescribed need be erected only every 40 m. of the length of the group, and need not be raised above the roof more than 20 cm.

f. In place of the enclosures on streets as prescribed in secs. 57 and 58 of the Building Ordinance, any other sort of enclosure may be allowed by which the cleanliness of the street and the safety of passers-by are not endangered.

g. The buildings may be occupied four months after their inspection in the rough.

PROHIBITION OF OFFENSIVE INDUSTRIES

Sec. 11

1. In residential and suburban house districts the erection or enlargement of works which may be injurious, dangerous, or annoying to the owners or occupants of neighboring lots or to the public generally by spreading injurious gases or dense smoke or making unusual noises, especially works that under sec. 16 of the National Industrial Ordinance [43] must be especially licensed, are forbidden.

On main traffic streets in residential districts, small bakeries, confectioners, and butchers' shops, etc., may be erected by special license.[44]

2. In suburban house districts, workshops of every sort, hospitals, restaurants and other objectionable enterprises; also such stores as by their conduct cause smells, noise, or other annoyance, are forbidden.

PARTICULAR PROVISIONS FOR SPECIAL SECTIONS

* Sec. 12

[Here follow several pages of provisions applicable in some places to large, in others to very small areas. These provisions are public

* Summarized.

[43] See p. 210.

[44] This provision was passed May 21, 1912.

ordinances but in many cases were passed on petition of the land owners concerned. Some of these regulations are public law and nothing else; some of them also form part of private restrictive covenants. In all cases, in so far as they are public, they may be changed or repealed like other ordinances. A specimen of these special provisions is given below. The reader will have noticed similar provisions in the case of the building ordinance, a translation of which is given on p. 228 (secs. 64, 65, p. 237.)]

1. *Residential District, Inner Zone*

. . . . . .

2. For the section between Hohenzollern Square, Kettenhof Way, Königs Square, Varrentrapp Street and Bismark Boulevard, the following provisions apply:

a. In block B——,[45] also in the tract on Hohenzollern Square between Victoria School and Roon Street, as well as on Roon Street, only buildings of two stories may be erected; also the ridge of the roof and vertical projection must not exceed 14 m. . . .

c. On Hohenzollern Square, groups of buildings are not permitted.

d. In blocks A and B only buildings with at most two apartments . . . are allowed. . . .

f. Workshops of every sort, hospitals, restaurants and similar objectionable enterprises are not permitted. In Blocks A, B, D, and E stores are also forbidden.

In block C, on the Moltke Boulevard and Königs Street, shops whose conduct causes smells, noise, and other annoyances are forbidden; on Bismark Boulevard, in the block, stores are allowed only upon special license of the executive branch of the city council. On the corner of Moltke Boulevard and Bismark Boulevard, the erection of a first class café may be permitted.

g. For public buildings the executive board may grant exemptions. . . .

TRANSITIONAL AND EXCEPTIONAL PROVISIONS

Sec. 13

1. *Exemptions That May Be Allowed in Certain Localities*

I. The building police is authorized to allow appropriate exceptions when by the complete application of the provision of secs. 4-8 and 12 the building up or use of lots situated on streets or parts of streets which on April 1, 1910 were already opened and in part

[45] The boundaries of each block are given in the original.

built up would be made materially more difficult or impossible either by reason of unfair limitation of height with relation to the height of existing buildings or otherwise.

II. To the building police the right is further reserved to allow exceptions for public buildings, hospitals, buildings for philanthropic institutions, and monumental private buildings.

III. In the residential and mixed districts of the rural district zone and in the suburban house district, newly built dwelling houses in the sections which are not yet connected with the city sewer system may be erected only when the building police consider the existing facilities for the disposal of sewage, drainage, etc., sufficient for sanitary purposes.

PENALTIES AND RULES FOR ENFORCEMENT

Sec. 14

*I. Fines, etc.

II. In addition the removal of the condition contrary to this ordinance may be compelled when as a result of voluntary transfer or other acts of the landowner the open space required by section 7 no longer is at hand or when single family houses in the erection of which one or more of the exemptions of secs. 4, 6 and 7 were made use of, are utilized for apartments for several families or when any other use of lots contrary to the provisions of this police ordinance occurs.

III. Areas which with relation to a given lot are required to be left free of structures or the leaving open of which is assumed in the granting of the permit to build, remain, so far as the minimum free spaces under this ordinance are concerned, burdened with this restriction when they are cut off from that lot or through transfer of title they have wholly or partly passed into other hands; and such areas, in granting additional permits to build, cannot be considered.

DATE WHEN ORDINANCE GOES INTO EFFECT; AND REPEALS

* Sec. 15

The ordinance in effect April 8, 1910, repealing many previous ordinances.

No. 3. THE DÜSSELDORF BUILDING ORDINANCE[46]

The building ordinance of Düsseldorf is detailed and complicated. It contains certain structural and other provisions which are the same

* Summarized.

[46] Passed March 8, 1912. It will be found in German in a convenient form as edited by P. Wagner, Gebr. Tonnes, Publishers, Düsseldorf, 1912.

for the entire city and which, in this brief summary, there will be little occasion to consider; and zoning provisions, which are the chief concern of this inquiry. The purpose of the zoning rules, in Düsseldorf as elsewhere, is to produce structures which in bulk and type are, so far as possible, suited to the part of the city in which they are to be situated; in the attainment of which result the bulk of structures, in proportion to the area of their lots, decreases as the distance from the centers of business, congestion and high land value becomes greater; and the type of building is adapted to the situation and best use of the land on which it is to stand.

The zoning regulations consist of (bulk) zone rules and class rules. The zones, five in number cover the entire city; the classes, of which there are eleven in all, occur only in those districts or on those streets or parts of streets, within the zones, to which they are applied; the class rules, in so far as there is conflict, superseding the zone rules. The main purpose of the zone rules, as distinguished from the class rules, is to fix the bulk of buildings; but these rules do sometimes favor certain types of building. The main purpose of the class rules is to fix the type of building, but these regulations are to some extent bulk regulations.

To illustrate: In zone I, a third of each lot must, as a general thing, be left free of buildings; but, if there are any rear buildings on the lot, one half of it must be left open. This provision discourages the erection of rear buildings but does not forbid it. In class B II, on the other hand, a rear building line, not demanded by any zone regulation, is required; and the height limit is thirteen meters, superseding the limit of the zone, whichever it may chance to be, in which this class is found. These are bulk regulations, but they are employed not so much to limit bulk as to produce or aid in obtaining a given type of structure.

In the building regulations of Düsseldorf, as in those of all cities, there are many rules that apply throughout the entire city, a few of which must be considered, and there are also certain rules that vary in the different zones and classes. Düsseldorf, too, has formulated in her building ordinance certain definitions which, besides making that ordinance more intelligible, are interesting and suggestive. This summary of the Düsseldorf building ordinance will therefore give: (A) definitions, (B) general provisions, (C) the general scheme of division of the city into zones and classes, (D) the zone rules, (E) the class B or residential class rules (the other class rules having been sufficiently indicated in the general scheme of division under (C). In this survey of the Düsseldorf ordinance only those provisions are taken up which are novel or especially important, and these only in outline, without explanatory or qualifying details and exceptions.

A

DEFINITIONS

One, Two, Three or Four Story House. A house used solely for residential purposes and which in design, construction and equipment is fitted for use only by one, two, three, or four families, respectively. In no case shall a story have more than one apartment. A janitor's apartment when and as authorized by this ordinance is not regarded as an infringement of this rule.

Double House. A building exclusively for residential purposes, with a common stair well, which serves two families on each floor; the two apartments being otherwise separate and distinct. The number of main residential rooms in the apartments of any floor shall not differ in number by more than one; and the number of any of the subordinate rooms such as bathrooms, etc., shall be the same.

Small House. A one family house with not more than two stories and not higher than 7.5 m., or a two family house of the same plan but with not more than eight principal dwelling rooms.

House of Small Tenements. A house strictly for residence, containing only small apartments, i. e., family dwellings with at most three principal dwelling rooms. Under the provisions for this class of house, by special permit, a house with a family apartment in the ground story with four main dwelling rooms and small stores or shops, may be built.

Large Tenement House. A house of more than two stories (excepting the roof story) which, exclusive of permissible rooms or apartments in the roof story, contains not more than twelve apartments.

Rural Buildings. Residential and agricultural buildings dwelt in and used only by the owner of the land, his relatives and employees.

Common Courts. Courts on contiguous lots the permanency of the union of which is secured by covenant between the neighbors, and between each of them and the city.

Common Side Setback Spaces. Contiguous side setback spaces on neighboring lots the permanency of the union of which is secured by covenant between the neighbors, and between each of them and the city.

B

GENERAL PROVISIONS

Height. Height is measured to the upper surface of the cornice. The maximum varies from 20 m. to 7.5 m. Except on streets which

may be built up on only one side, the front house must in no case be higher than the street is broad. On corner lots the height on the broader street may be carried along the narrower street to a distance equal to the width of the wider street, but in no case more than 20 m. The height of rear buildings, wings, etc., is regulated by the width of the courts in front of them and varies in the different zones and classes.

Light Profile. Buildings extending back from the building line more than 20 m. must, on the sides toward the neighboring side line, keep within a height and profile varying in the different zones and classes, so as not to obstruct their neighbor's light.

A lot is, as a rule, relieved of this obligation when the neighbor is under the legal obligation not to construct required windows giving on this lot.

Number of Stories. The maximum number of stories varies in the different zones and classes from 5 to 2. It is lessened by one in many cases, among which may be mentioned: when any of the principal residential rooms are in the cellar; when the cellar is so built that the upper surface of the floor of the story over it is more than 1.5 m. above the sidewalk or court; when any of the principal residential rooms are in the roof story. But there is no such diminution in the number of stories on account of the construction, in conformity to the rules of the building ordinance as to height, roof angle, etc., of rooms in the roof story not connected with one another which do not form an apartment and do not together cover more than half the floor area below the joists. There are also exceptions for single houses and houses of small apartments.

C

OPEN SPACE

In General. On every lot a given proportion must be left free of buildings, the proportion varying from 1/10 to 7/10.

In calculating the obligatory amount of open space, the usual projections into or over the court space are allowed without increasing the amount so required; and also a proportion of the lot area varying in the different zones and classes from 1/8 to 1/4 may be covered with subsidiary buildings not more than 5 m. high, the land so covered being nevertheless reckoned as open space. In zone I, however, there is no such provision.

With regard to open space on corner lots see *corner lots*, p. 255.— Where a lot is developed exclusively with (a) a one, two, three or four family house; or (b) with a house with not more than two

apartments on a floor; or (c) with a "house of small apartments" with not more than three apartments on a floor, if in each case the house does not extend back from the building line to a greater depth than 20 m., the required open space is, as a rule, reduced. This rule does not apply to zone I and to it there are exceptions in zone V.

Rear Building Lines for Entire Blocks. Where, on petition of the property owners interested, the building police, after hearing the city authorities, has established for an entire block, rear building lines enclosing in the interior of the block not less than a given proportion of the total area, varying in the different zones from 3/10 to 6/10, this proportion may, as a rule, be fixed as the proportion of open space for the entire block; and all but the interior space so enclosed built over. In zone V, if the interior is devoted to common parks, playgrounds, etc., and the proportion is 6/10, an extra story (3 in all) is permitted.

Side Setbacks. Buildings must, as a rule (when zone and class rules permit), be placed on the neighboring boundary, or with a setback from it of at least 2.5 m.; and buildings on the same lot (except as zone and class rules provide otherwise) must be built against one another or with a space between of at least 2.5 m.

Detached Building in Zones and Classes Where Attached Building Is Permitted. In such cases there must be to at least the depth of 20 m. from the building line, a minimum side setback from the neighbor's boundary of 10 m.; or, if a "common setback space" is established, a minimum setback on each lot, which, for a building height on the setback space of from 7.5 m. to 15.5 m. and more, is from 2 to 5 m. These heights must be maintained for a distance of 7 m. from the setback space.

Offensive Enterprises. Wherever situated, such enterprises must be located in rooms with specially and permanently closed windows on the street, or with a set back from it of at least 4 m.

Light Profile. Buildings extending back from the building line more than a given depth must, except in classes C and D, keep within a given side and height profile so as not to obstruct their neighbor's side light. In class B v and in the zones outside the classes, this rule does not apply when the neighbor is under the legal obligation not to construct required windows giving on the lot in question. The depth back of the building line at which this obligation to maintain the light height and profile begins, varies in the different zones and classes from 20 to 40 m., and the height from 20 to 5 m.

Narrow Lots. As a rule only lots with a frontage of at least 7 m. on a public street at least 7 m. wide, may be built up; but in certain parts of the older city this rule does not apply to rebuilding; and for one family houses and small houses built as front houses, a lot frontage of not less than 5 m. is permissible.

Corner Lots. A corner lot is deemed to be bounded on its two

sides that are not street fronts, by two lines of equal length called "normals" which shall start at a common point and run to the street or building lines. These lines vary in length in the different zones and classes where they occur from 24 m. to 40 m. Rules are given for carrying out this system and meeting exceptional cases.

On corner lots with an angle of from 135 to 100 degrees, seventy-five per cent. of the area may be built over; with every 5 degrees decrease of the angle, the permissible area to be built over increases one per cent; but in no case may the lot be built up deeper than 16 m. There are special rules for certain lots next to corners.

Where a corner lot is in more than one zone or class, the corner house up to 20 m. from the corner may have the number of stories allowed for the zone or class with the most liberal provision.

D

DIVISION OF CITY INTO ZONES AND CLASSES

The entire city is divided into five zones in which the rules in regard to the height, area and number of stories of buildings varies. In these zones are areas covered by special rules as follows:

Class A—Inner City. In the inner city and on chief business streets outside the inner city, the building police may allow certain exceptions to zone rules in the interest of business. These exceptions allow a greater intensity of building.

Classes B I–VIII—Residential Classes. By special police ordinance certain streets, parts of streets and districts may be designated as residential areas. These areas are subject to the zone rules as modified by the rules of the building class to which they are assigned. In classes B I–VI attached or block, in classes B VII–VIII detached building is provided for.

Protected Districts. By special police ordinance certain districts may be designated in which the location and prosecution of offensive industries is limited. These districts are called "protected districts." Residential streets and parts of streets (classes B I–VIII) are protected districts without further designation.

Class C—Industrial Class. In districts or on streets designated as industrial, the rules of zone I apply, and in special cases the building police may allow a greater intensity of building. See also "offensive enterprises," p. 254.

Class D—Rural Class. This class is intended for rural development in which rural buildings only shall be built. On permit from the city authorities after hearing, many of the requirements of the building ordinance and of the zone in which the land is situated may be waived in certain particulars and to a given extent. The greatest permissible number of stories is two and the maximum height 7.5 m.

E

ZONE RULES

Zone I

The minimum required proportion of lot area to be left open is ⅓;
but if there are rear buildings with residential apartments on the lot, ½;
or, if there are no buildings on the lot higher than 10 m. or with more than two stories, ¼.
The maximum number of stories is 4;
but for rear buildings with residential apartments 3.
The maximum height is 20 m.
The maximum height of light profile on the neighbor's boundary is:
at a depth of from more than 20-30 m. 20 m.
at a greater depth, 14 m.
The maximum height of rear buildings, etc., is court width plus 5m.;
or, if a common court is established, combined court width plus 3 m.

Zone II

The minimum required proportion of lot area to be left open is ⅓;
but if there are rear buildings with residential apartments on the lot 6/10.
The maximum number of stories is:
with streets under 13 m. in width, 2;
with streets without front gardens and a street width of at least 20 m.; or:
with streets with front gardens and a street width of at least 20 m.; or a width between building lines of at least 26 m. and a street width of at least 15 m., if (except for corner houses with at least four apartments to a floor) there are no large tenement houses on the street:
to a depth of 20 m., 4;
beyond that depth, 3;
on all other streets, 3;
but for lots with rear buildings with residential apartments 2.
Where the front house has four stories, rear houses are not permitted unless there is a minimum space between equal to the height of the front house.

The maximum height is 16 m.;
except that where four stories are allowed it is 20 m.
The maximum height of light profile on the neighbor's boundary is:
at a depth of from more than 20-30 m. 16 m.
at a greater depth 11 m.
The maximum height of rear building, etc., is
court width plus 5 m.
or if a common court is established,
combined court width plus 3 m.

Zone III

The minimum required proportion of lot area to be left open is 6/10.
The maximum number of stories is
with streets without front gardens and a street width of at least 20 m.; or
with streets with front gardens and a street width of at least 20 m. or a width between building lines of at least 26 m. and a street width of at least 15 m. if (except for corner houses with at most four apartments to a floor) there are no large tenement houses on the street
to a depth of 20 m. 4;
to a depth of from 20-25 m. 3;
beyond that depth, 2;
on all other streets,
to a depth of 25 m. 3;
beyond that depth, 2.
For lots on all streets for which to a depth of 25 m. the maximum number of stories is 3, the maximum on the establishment of a common court and in the case of double houses is,
to a depth of 30 m. 3;
beyond that depth 2.
Where the front house has four stories, rear houses are not permitted unless there is a space between at least equal to the height of the front house.
The maximum height is 16 m.;
except that where four stories is allowed it is 20 m.
The maximum height of light profile on the neighbor's boundary is:
at a depth of from more than 20-30 m. 12 m.;
at a greater depth, 8 m.

The maximum height of rear buildings, etc., is
court width plus 5 m.
or, if a common court is established,
combined court width plus 3 m.

Zone IV

The minimum required proportion of lot area to be left open is on 68 named streets or parts of streets:
when the height of the buildings on the lot is not more than 8 m. ¼;
when not more than 8-12 m. ⅓;
when in excess of 12 m. 4/10.
On all other streets 6/10.
The maximum number of stories is
for lots on streets under 13 m. in width, 2,
for lots on all other streets:
to a depth of 25 m. 3;
beyond that depth 2.
The maximum height is 16 m.
The maximum height of light profile on the neighbor's boundary is:
at a depth of from more than 20-30 m. 12 m.;
at a greater depth, 8 m.
The maximum height of rear buildings, etc., is
court width plus 5 m.;
or if a common court is established,
combined court width plus 3 m.

Zone V

The minimum required proportion of lot area to be left open is 7/10;
but if on the lot there is only a small house it is ½;
and if only a front house extending back from the building line not more than 16 m. it is 6/10.
The maximum number of stories is 2.
The maximum height is 13 m.;
but wherever the maximum number of stories is 3, it is 16 m.
The maximum height of light profile on the neighbors' boundary at a depth of over 20 m. from the building line is 8 m.
The maximum height of rear buildings, etc., is court width;
or if a common court is established combined court width.

F

B OR RESIDENTIAL CLASS RULES

I

Classes B I-VI. General Rules

Attached building is allowed. Only front houses and (except in B VI), subsidiary buildings strictly for domestic uses, such as stables, servants' dwellings, garden houses, arbors, etc., are permitted. Front houses except those next to corner lots, must not extend to the rear property line.

Class B I

Intended for one and two family houses, on lots without rear building line. Only one and two family houses, or double houses with at most 4 apartments, allowed. Two family houses must have a front width of at least 12 m., double houses, of 22 m. Maximum number of stories 2.

Class B II

Intended for one and two family houses on lots with a rear building line. Only houses with at most 2, double houses 4, apartments allowed. Must not extend more than 16 m. back from the building line, except one story subsidiary buildings, which may go back 20 m. Maximum number of stories 2.
maximum building height, 13 m.

Class B III

Intended for one, two and three family houses, on lots without rear building line. Only houses with at most 3, double houses 6, apartments allowed. Maximum number of stories, 3.

Class B IV

Intended for one, two and three family houses on lots with rear building line. Rules the same as in Class B II, except that the maximum number of stories is, 3.
Maximum building height when constructed with at most 3, double houses 6, apartments, is 16 m.

Class B V

Intended for apartment houses and must have at most 2 apartments in any one story. In a number of ways, a greater building intensity is permitted.

Class B VI

Intended for tenement houses and houses of small tenements. At most 2 apartments to a floor, or for a house of small tenements, 3 such apartments. Subsidiary buildings may be erected for shops, etc., of those dwelling on the lot, for such pursuits as in the judgment of the building police will not cause dangerous or annoying odors, smoke, noise, etc.

Classes B VII-VIII. General Rules

Detached building is required. The general rules for the attached classes B I-IV apply with the following additions:

Only one and two family houses and double houses with at most four apartments are permitted. The maximum number of stories is two.

Buildings on the side toward the required side setback space must receive appropriate architectural treatment and finish. The side space must not be used for storage but, with the exception of necessary entrances and exits, must be kept as an ornamental garden. The usual projections within much the usual limits into and over this space are allowed.

Groups are allowed, but only when security is given that all the houses will be erected at the same time, and the group as a whole will receive proper architectural treatment. As a rule not more than three houses, none of which may be double houses, are allowed in a group. Alterations and reconstructions, including painting of the façade, are subject to the approval of the building police. Common courts are allowed. At street corners where detached and attached classes meet, the building police may allow a continuation of attached buildings into the detached class, but not for more than three houses beyond the corner.

Class B VII

(*a*) Intended for one and two family houses on lots without a rear building line. Two family houses must have a minimum width in front of 12 m. and double houses of 22 m.

(*b*) Except as provided below, buildings must maintain, to a depth of 30 m. from the building line, a side setback from the neigh-

boring boundary, of 5 m.; but beyond that depth subsidiary buildings are subject only to the setback provision mentioned under C.

(*c*) For a group of three houses the side setback is 10 m.; for two houses or a double house 8 m.

(*d*) The side space for a house or group may be decreased to not less than 3 m. when proportionately increased on the other side; as also when a common setback space is established if proportionately increased on the other lot.

(*e*) It may be decreased by 2 m. (but in no case to less than 3 m.) when (except the sides of the front building) within 7 m. of the side space the neighboring building does not exceed 7.5 m. in height.

(*f*) The minimum proportion of open space is 7/10.

Class B VIII

(*a*) Intended for one and two family houses on lots with a rear building line. For 4 m. from the neighbor's side boundary, the building must not extend back from the front building line more than 16 m.; or at a greater distance from the neighbor's side line, more than 20 m.; but subsidiary buildings may to the entire width of the lot extend back 20 m.

(*b*) The provisions of B VII (*b*) apply except that the depth is 25 m. for 3 m. from the neighbor's side line.

(*c*) The minimum side space for two houses is 4 m.; for three houses 5 m. By exception groups of not more than five small houses may be licensed, in which cases the side setback for the group is:

If the group consists of not more than three such houses 2 m.;
" " " " " " " four " " 3 m.;
" " " " " " " five " " 4 m.

Double houses must maintain a side setback of 4 m. or if erected as small houses 2 m.

(*d*) The provisions of B VII (*d*) apply except that the minimum side space is 2.5 m.

(*e*) Except to groups of small houses, the provisions of B VII (*e*) apply; but the decrease is 1.5 m. and the minimum 3 m.

(*f*) The minimum proportion of open space is 6/10.
but for lots with one small house only, 1/2.

No. 4. A Comparison of the Cologne, Frankfort, Karlsruhe and Munich Zoning Provisions

For facilitating comparison between them, the zoning provisions of the four cities named are here given in tabular form. All but the Cologne table are translations of the tables in the official or standard

editions of the building ordinances in question; and the Cologne table was prepared from the Cologne ordinance in form to correspond with the other tables.

No. 1. Cologne Building Classes

Ordinance adopted August 9, 1913.

Class [1]	Character	Maximum No. of stories	Maximum height in meters to top of cornice	Minimum per cent of open space on lot [3]		Groups maximum No. of houses and length of front	Minimum side space in meters [4]	Depth of front garden (g) and width of side space (s) not reckoned as open space
				Inner	Corner			
Ia [2]	attached	4 + R	20	25	20			(g) 6 m.
Ib	"	"		35	25			
Ic	"	"		50	30			
Id	"	"		60				
IIa	"	3 + R	15	50	30			
IIb	"	"		60				
IIIa	"	2 + R	12.5	60	30			(g) 5 m.
IIIb	"	C + 2 & R	15	70				
IVa	detached	2 & R	12.5	60	30	2 to 30 m.	5	(g) 5 m.
IVb	"	C + 2 & R	15			3 and 4 to 50 m.	6	(g) 5 m. (s) 6 m.
Va	groups	2 + R	12.5	50	30	7 to 70 m.	5	(g) 5 m.
Vb	"	"		60				
Vc	"	C + 2 & R	15				6	(g) 5 m.
VI	detached	3 + R	15	60	30	2 to 45 m.	6	(s) 6 m.

m. = Meters.
R. = Roof story, between the top story over the attic, over the joists.
C. = Cellar story.

[1] The development of a lot in more than one building class, is governed by the provisions which, in number of stories and open space, require the less intensive use.

[2] Business structures, with no dwellings in them but for janitor, etc., where under the existing regulations the street width permits may have 5 stories (in addition to cellar and roof story) on condition that they leave 30 per cent (corners 25 per cent) of lot open; amendment of May 1, 1919. The same amendment makes certain modifications of structural requirements for small houses, and one-family houses.

[3] There are also rear building lines, in certain cases. Where an interior common playground, of at least 5 per cent of the ground area of the block, is provided and permanently secured by agreement with the City, the area of each lot may be covered by buildings up to 5 per cent in excess.

[4] In all classes, buildings must, as a rule, wherever building on the boundary line is permitted at all, be located either on that line, or with a setback from it of at least 2.5 meters, and the same space must be preserved between buildings and parts of buildings on the same lot, not built against one another. Compare the Frankfort provisions in following table.

Building Zones or Classes		I Inner City	D Mixed District of the Inner Zone	A Residential District of the Inner Zone	
		Attached Building	"Character" of Building See E	Building groups up to 80 m. 3 m. side space	
Height of Front Buildings	In general	Street width + 2 m. or **3 m.**	Street width plus 2/3 front		
	Maximum	**20 m.**	18 m.	18 m.	Part of Zone on streets up to 14 m. only 2, and on wider streets only 3 stories, under restrictions of Police Ord. of Apr. 8, 1910, Sec. 12, I.
Open spaces on the Lot	Interior lot	1/4	4/10 (Exclusive of front garden)	Double and rear dwellings, 10 sq. m. and dwellings with more than 4 rooms, an additional 1/20.	
	Corner lot	1/6	3/10 (Exclusive of front garden)		
Height of Rear Buildings	In general	Width of Court in front + 2 m.	Width of Court in front	Width of Court in front when 30 m. distant from building line, 13 m.	
	Maximum	20 m.	13 m.		
Number of residential stories	Front Buildings	5	4 + 1/2 D.	4 + 1/2 D.	
	Rear Buildings	**4**	3 + D.	3 + D.	

NOTES:
D. = Roof story on which residence is permitted.
m. = Meters.
In the residential district of the inner, outer and rural district zones, as well as in the sub
There are parts of the factory district, to which the provisions of Sec. 12, No. VI, 1–2, ap

When rear dwelling e
ments, 1/10 additional

E	F	B	C	G	H
rict of the Zone	Mixed District of the rural district zone	Residential district of the Outer Zone	Residential District of the rural district zone	Suburban house District	Factory District
uilding on out front otherwise, to 80 m. space.	Building groups up to 80 m. 3 m. side space.	4 m. side space. Groups up to 80 m., only by exemption, and under certain conditions.		Detached building. Double houses permitted by exemption.	Attached building.
th	Street width plus 2/3 front garden depth				Street width + 2 m.
Part of Zone in which buildings with 3 stories, the roof story not to be fitted up for independent dwelling, or restriction of Sec. 12, I, No. IV, of Police Ord. of Apr. 8, 1910, applies.	16 m.	18 m.	16 m.	16 m.	20 m.
Double houses, etc., as in F. & B.	5/10 4/10 Exclusive of front garden	Double and rear houses 10 sq. m. and dwellings with more than 4 rooms, an additional 1/10	5/10 4/10 Exclusive of front garden; Double houses, etc., as in F. & B.	7/10 of Building lot	At least 3/10 if area behind building line.
urt	Width of Court in front 9 m.	When 45 m. from Building line. 9 m.	Width of Court in front when 45 m. from building line. 9 m.	Independent dwellings for rent, forbidden. 6 m.	Width of Court in front + 2 m. 20 m.
ets m.,	2 + D on Streets up to 18 m.; elsewhere 3 + D.	2 + D on Streets up to 14 m.; elsewhere 3 + D.	2+D on Streets up to 18 m.; elsewhere 3 + D.	2 + D	Number of stories not limited. Dwellings only for owner and superintending staff.
	2 + D	2 + D	2 + D	1 + D	

Part of Zone in which restrictions of Sec. 12, No. II, 1. A. H. of Police Ord. of Apr. 8, 1910, applies.

more than three apart-
eft free from structures.

e district, manufacturing structures are forbidden.
are streets, running through various zones or classes, on which four stories are permitted.

No. 3. Karlsruhe Building Classes

Ordinances adopted March 29, 1912

Building Class	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Character of Building	ATTACHED							DETACHED						MIXED	
Setback from side boundary, least, in m.								3	3	3.5	4.5	3×	3	3	2.5
Length of groups, most, in m.								40	40	30	30		25		
Same on the corner, in m.								50	50	40	40		30		
Size of courts, in fractions of area of lot	1/4	1/4	1/3	2/5	1/2	1/2	1/2	1/2	1/2	1/2	1/2	1/2	1/2	1/2	2/3
Same for corner lots	1/8	1/8	1/6	1/5	1/3	1/3	1/3	1/3	1/3	1/3	1/3	1/3	1/3	1/3	1/2
Distance of windows of dwelling rooms from an opposite wall, in fractions of the portion of that wall which is higher than the window sill	0.4	0.5	0.6	0.9	1	1	1	1	1	1	1	1	1	1	1
Greatest number of stories in front buildings	5	4	4	4	4	3	3	3	3	2	2	2	2	2	1–2
Same in rear and side buildings	3–4	3	3	3	3	2	+	2	+	+	+	+	♯	♯	♯
Greatest permissible front height of rear and side buildings, in m.	15	12	12	12	12	9	6	9	6	6	6	6	6	6	3.5
Greatest permissible height to ridge pole of rear and side buildings, in m.	16	14.5	14.5	14.5	14.5	11.5	9	11.5	9	9	9	9	9	10	4.5
Least floor area of a room, in sq. m.	12	12	12	12	12	12	12	12	12	12	12	12	10	10	10
Same in roof story, in sq. m.	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10
Least height of a room, in m.	3	3	3	3	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.6	2.6	2.6
Same in roof story, in m.	2.7	2.7	2.7	2.7	2.6	2.6	2.6	2.6	2.6	2.6	2.6	2.6	2.5	2.5	2.5
Greatest permissible number of apartments in one house							4		4	2	2	2			1

× The sum of the two side spaces must equal 10 m.
+ Only stables and carriage houses.
♯ Not for residence.
m. = meters.

No. 4. Munich Building Classes

Ordinance adopted April 20, 1904

Class	Character	Front buildings maximum no. of stories	Rear buildings maximum no. of stories	Greatest permissible height, front buildings	Greatest permissible height, rear buildings	Court, minimum area in fractions of lot area	Groups greatest length	Side space least
1	attached permissible	5ƒ	4	₩	₩	§		
2	"	4	4	18 m.	18 m.	1/3		
3	"	4	2	18 m.	12 m.	1/3		
4	"	3	2	15 m.	12 m.	1/3		
‡5	"	2	1*	12 m.	9 m.	1/3		
6	detached	4	4	20 m.	20 m.	1/3†	45 m.	7 m.
7	"	4	2	18 m.	12 m.	1/3†	45 m.	9 m.
‡8	"	3	2	15 m.	12 m.	1/3	36 m.	10 m.
‡9	"	2	1*	12 m.	9 m.	1/2	36 m.	10 m.

ƒ Residential buildings; others, no limit.
₩ Private buildings, not more than equal to width of street and front gardens; but on streets less than 12 m. broad, 12 m. is allowed. The maximum height for residential buildings is 22 m.
* Without independent residential apartments to rent.
† Light courts not allowed.
‡ In blocks in which this class is found, offensive industries, etc., not permitted.
§ Sufficient for health, etc.

General Note: Except in class 1, front and side buildings, in so far as they exceed 22 m. in depth, are regarded as rear buildings.
Except in class 1, the roof story may be utilized for residence only to half its area.
In industrial areas, exceptions are allowed for industrial buildings.
m. = meters.

CHAPTER III

ZONING IN CANADA AND THE UNITED STATES

Early Zoning on American Continent.—Many years before zoning, as we now understand it, was employed anywhere on the American continent, measures embodying something of the zoning principle, although not known as zoning regulations, were passed, and restrictions based on them imposed, both in Canada and in the United States. In 1899 a Federal statute since frequently amended [1] was enacted limiting the heights of buildings by zones in Washington, D. C.; and in 1904 Toronto under secs. 409-410 of the Ontario Municipal Act, began to create residential and industrial districts. In Canada since 1909 zoning along English lines has been authorized in a number of Provinces by town planning acts modeled on the English act of that year.[2] Lately, however, to some extent, Canada has authorized zoning ordinances like recent zoning regulations in the United States.[3]

In this country, prior to the zoning of New York City in 1916, only acts allowing the less complete sorts of zoning were passed. Thus during this period in Baltimore [4] and Indianapolis [5] a height limit for a small area, lower than the limit

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[1] 30 U. S. Stat. 922, ch. 322 (March 1, 1899); 32 *ibid.* 1022; 33 *ibid.* 14, ch. 158 (Feb. 16, 1904); 36 *ibid.* 452, ch. 263 (June 1, 1910). See also Building Regulations of District of Columbia.

[2] For a list of these acts, see p. 510, note 27.

[3] See, for instance, the amendment of the Municipal Act of Ontario, Laws, 1921, ch. 63; also the Manitoba Town Planning Act, 1916, ch. 114 secs. 5, 6, and 7, and schedule A, for the zoning of central area; and the Saskatchewan Town Planning Act, Rev. Stat. 1920, ch. 104 Part II, for the approval by the municipality of sub-divisions beyond and within two miles of its limits; reference to which will be found on p. 313.

[4] Laws Maryland, 1904, ch. 42, held to be constitutional in Cochran v. Preston, 108 Md. 220 (1908).

[5] By ordinances passed in 1905 and 1912; see *Report of Heights of Buildings Commission, New York City,* Dec. 23, 1913, p. 35.

for the city as a whole, was fixed; in Boston [6] height districts covering the entire city were created, and in several cities residential districts were established from which were excluded certain industries and, in some cases, also business and even multiple dwellings. As a rule, in these regulations, the prior petition or subsequent consent of a proportion of the property owners of the district was a requisite to its creation.[7] This provision obviously makes the use zoning of the city in accordance with any plan difficult if not practically impossible; and unless action by the city in the general interest is also required, such zoning is illegal.[8] If the districts could be established by the consent of the property owners alone, this would in effect be delegating to them the power to establish municipal regulations, which obviously cannot legally be done, although the

[6] Special Acts 1904, ch. 333; 1905, ch. 383; 1907, ch. 416; 1912, ch. 582; 1914, ch. 786; 1915, ch. 333; 1919, ch. 156. For a full account of the Boston regulations, see the *Report of the Heights of Buildings Commission,* just cited, p. 134.

[7] See *Report of Heights of Buildings Commission, New York City,* 1913, p. 38.

[8] Ordinances admitting into or excluding from a locality a given use upon the consent of a percentage, less than all, of the property owners of that locality is void as an improper delegation of governmental power.

California.—In re Quong Wo, 13 Fed. Rep. 229 (1882); Ex parte Sing Lee, 96 Cal. 354 (1892), Coon v. Bd. of Public Wks., 7 Cal. App. 760 (1908); see Sam Kee v. Wilde, 183 Pac. Rep. 164 (1919).

Colorado.—Denver v. Rogers, 46 Col. 479 (1909); Curran Co. v. Denver, 47 Col. 221 (1910); Willison v. Cooke, 54 Col. 320 (1913).

Delaware.—Dangel v. Williams, 11 Del. Ch. 213 (1916).

Illinois.—Chicago v. Gunning System, 214 Ill. 628 (1905); People ex rel. Friend v. Chicago, 261 Ill. 16 (1913).

Kentucky.—Telford v. Belknap, 126 Ky. 244 (1907).

Missouri.—St. Louis v. Russell, 116 Mo. 248 (1893); Hays v. Poplar Bluff, 263 Mo. 516 (1914).

Nebraska.—State v. Withnell, 78 Neb. 33 (1907).

Virginia.—Eubank v. Richmond, 110 Va. 749 (1910), 226 U. S. 137 (1912).

Wisconsin.—State ex rel. Nehrbass v. Harper, 162 Wis. 589 (1916).

As a prerequisite to action by the public authorities or as a waiver of a prohibition, a provision for consent is valid.

Delaware.—Myers v. Fortunato, 110 Atl. 847 (1920).

District of Columbia.—Weeks v. Heurich, 40 App. D. C. 46 (1913).

Illinois.—City of Chicago v. Stratton, 162 Ill. 494 (1896); People ex rel. Busching v. Ericsson, 263 Ill. 368 (1914); People ex rel. Keller v. Village of Oak Park, 266 Ill. 365 (1914); Cusack Co. v. City of Chicago, 267 Ill. 344 (1915); 242 U. S. 526 (1917).

New York.—In re Russell, 158 N. Y. Supp. 162 (1916).

Washington.—City of Spokane v. Camp, 50 Wash. 554 (1908); Shepard v. Seattle, 59 Wash. 363 (1910).

favorable action of the property owners may be made a prerequisite to action by the municipal authorities; and in this way, in most of the regulations, action by these authorities in the general interest is in fact provided for.

Los Angeles Ordinance.—The most fully zoned city of the earlier period was Los Angeles, California. The Los Angeles zoning rules are of interest both in themselves and because of their influence upon subsequent zoning on the Pacific Coast. The many ordinances regulating different features of the city, in various sections of it, were passed from time to time, the first being enacted in 1909. By 1915 they had come to cover, in one way or another, the entire city. They divided it into one large residence district, in which only the very lightest of manufacturing was allowed; twenty-seven industrial districts, in which all industries were permitted; and about a hundred "residence exception" districts, so called because, although scattered throughout the residence district, all but the heavy and objectionable industries might be pursued in them.

Of most interest were the provisions with regard to the residence exceptions. Classified as such were the business section of the city, known as Fire District No. 1, and the extensive port district, entirely undeveloped and only recently annexed to the city. Next in size was a district about a half mile square, and next to that, one covering two blocks. The other and typical residence exceptions, each consisting of one or at most two city lots, equaled in the aggregate less than one per cent of the residence district in which they were situated. If any person wished to establish an industry not of the heavy or objectionable type in the residence district, the city might and in practice always did require him to obtain the consent of sixty per cent of the owners of property affected. Objectionable industries, already established in the residential district, were compelled to remove or cease operation; but in other respects the zoning was not retroactive. Since 1915 the regulations have been frequently amended and many new ones passed.[9]

[9] Districts rarely if ever found elsewhere, such as cow districts, undertaking districts, motion picture districts, public garage districts, as well as billboard districts, and residential and industrial districts, have been created in this way by ordinances passed from time to time.

New York City Zoning.[10]—The first city in the United States to adopt a systematic and complete plan of zoning covering practically the entire city, both as to use and as to bulk, was New York. In the New York City zoning resolution the street in all cases is taken as the districting unit. Based on it, the city is divided into residence, business and unrestricted use districts—the unrestricted districts being intended especially for manufacturing—and height and area bulk districts. The use, height and area districts, although studied with reference to one another, are laid out each with its own boundaries. The resolution is not retroactive but applies only to the erection of future, and the change in use of existing, structures.

The Use Districts.—In residence districts only residences (including tenements and other multiple dwellings), various public and semi-public buildings, and farming and nursery structures, with their usual accessories, are permitted; a business, a use not on the same lot, or a private garage for more than five motor vehicles, not being considered an accessory.

In business districts both residence and business uses are permitted, but forty-four industries specifically, and all others generally, which are noxious or offensive by reason of the emission of odor, dust, smoke, gas or noise,[11] and other industry in excess of 25 per cent of the total floor space of the building, or the equivalent of the area of the lot, are excluded. This lim-

[10] The administrative features of this and the other zoning ordinances are considered in Part VII Chapter III.

[11] It will be noted that, while in many zoning ordinances the list of particular industries excluded as objectionable from a business or light industry district, and the general provision so excluding them, are both placed in the same paragraph, in the New York regulation they are separated as much as possible by being put into different paragraphs (see the New York resolution, sec. 4 (a), and (b), to be found on p. 307 of this work). The New York method is the preferable one. There is a principle of statutory interpretation, often referred to as the doctrine of "ejusdem generis," deep rooted in our law, that "When general words follow an enumeration of particular things, such words must be held to include only such things or objects as are of the same kind as those specifically enumerated" (Gundling v. Chicago, 176 Ill. 340 at 345 (1898); see generally Sutherland, *Statutes and Statutory Construction* (2d ed. by Lewis, printed by Callaghan and Co., Chicago, 1904), sec. 422 and cases there cited; or any similar work). To the layman it seems as if this doctrine often renders general expressions used in connection with such enumerations, meaningless. It is in the endeavor to avoid this effect that the New York resolution is drafted as above stated.

ited amount of inoffensive industry is evidently admitted as a necessary adjunct to business.

In unrestricted use districts there are no use zoning regulations or restrictions.

Nonconforming Bulks.—A building which exceeds the bulk limits allowed new buildings in the district, if accidentally destroyed, may be restored in its original bulk. Any wall of such a building declared unsafe by the city authorities may be rebuilt in like manner.

Nonconforming Uses.—The New York zoning resolution is the first to provide that a nonconforming use shall be allowed to continue so long as it remains as it was at the time of the adoption of the resolution; but that any change in it or in the building where it is located may and should be taken advantage of as a method of obtaining the greatest practicable approach to conformity. The requirements of the New York ordinance to this end are less severe than those of the later ordinances in other cities, as well as less clearly thought out and expressed.[12]

Garages.—One of the most difficult matters to deal with in use zoning is the location of garages. The garage is at once a neighborhood necessity and a neighborhood nuisance and menace. In the New York resolution private garages accommodating not more than five motor vehicles are admitted into residential and business districts as accessories;[13] but others are excluded as noxious industries. The framers of the resolution realized that there must be public garages in the immediate neighborhood of residence and business. This need was

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[12] These provisions are given in full on p. 310 of this work.

[13] At present the accessory garage in a residential district must be on the same lot as the residence of its owner or occupant, must be used exclusively by him, and cannot house a business or industrial car. It has been suggested that the owner or occupant should be allowed to rent out the space for one non-business or non-industrial car in such a garage or keep one light business or industrial car for his own use in it; and that this could safely be permitted if the number of cars allowed in an accessory garage were reduced from five to three. In smaller places, under later ordinances, not only are these greater privileges, as a rule, allowed but often the accessory garage need not be on the same lot. In many of these ordinances, the number of cars allowed in the private garage varies in proportion to the frontage of the lot.

already provided for to some extent by existing garages in such neighborhoods, which were at liberty to remain and continue in operation. The need of additional garages in these neighborhoods was met partly by the location and bounding of the various districts, the commission to this end increasing "the number of small unrestricted sections within convenient access of the local residence and business centers." [14] This need was also in part met by giving the Board of Appeals discretionary power to permit in a business district the erection or extension of a garage or stable in a block where a public garage or stable had existed at the time of the passage of the resolution,[15] and to allow a garage in any district, with the consent of 80 per cent of the owners of the frontage affected.

The Height Districts.—Height districts of three quarter, one, one and a quarter, one and a half, two, and two and a half times the street width at the street line, are created, a greater height being allowed as setbacks are made. Streets less than 50 and more than 100 feet wide are regarded as 50 and 100 feet respectively in width. For 100 feet, and in the case of a corner building for 150 feet, back on a narrower street, the height regulations of the wider street govern. Elevator bulkheads, parapets, cornices, etc., to a limited extent, and spires, chimneys, etc., to any extent, are allowed to transcend these limits. There is relief in certain cases where a new building will face structures already above the prescribed limits; and towers may go to any height, if not of more than 25 per cent of the lot area, and if they observe given setbacks from streets.

The Area Districts.—There are five area districts created —A, B, C, D, and E—in which the amount of prescribed open

[14] *Report of Commission on Building Districts and Restrictions* already referred to.

[15] The resolution as originally worded in this matter was interpreted to allow such location in the block front only on the same side of the street as that of the existing garage or stable (Beinert v. Miller, *New York Law Journal,* June 18, 1917, p. 1045) but was amended to allow such location on either side of the street in accordance with the original intention of the framers of the resolution. The discretion was granted in this form because of the fact that in a street front where a garage or stable already exists, additional structures of this sort do not change the neighborhood and do damage as they do in a street front where there had been none previously.

space on the lot becomes progressively greater. Thus in an "A" district a court of one inch in least dimension for each foot in height of the building is all that must be left uncovered; while in an "E" district, in so far as it is also a residential district (as it usually is),[16] interior lots must leave 50 per cent of their area free of building at the curb level and 70 per cent of it open at the level eighteen feet above the curb; all buildings being at least semi-detached. In the "C" and "D" districts the owner setting aside 10 per cent of the lot area for the joint recreational space of occupants of the plot, in addition to other required open space, may build in accordance with the requirements of district "B" and "C," respectively.

Preparation of New York Resolution.—The New York resolution and the plan for the division of the city into districts in accordance with it, adopted by the Board of Estimate and Apportionment of the city in 1916, was the result of long and careful study. In 1913 the city appointed a commission on "Height, Size and Arrangement of Buildings," called for convenience the "Heights of Buildings Commission." It was a citizen commission, composed not only of business men, lawyers, representatives of labor, students of social problems, taxation and city planning, but of men representing real estate interests in all its phases, such as architects, builders, bankers, insurance men and real estate brokers and owners. The principle upon which these men were selected was that a measure profoundly affecting so many and so diverse interests could be framed wisely and acceptably only by representatives of the various interests affected by it. This body of men studied the subject of building regulation in other cities of this country and abroad. They were assisted by a staff which investigated and presented to them in detail the existing conditions in this city. The members of the commission in this pioneer undertaking, as may well be supposed, entered upon their labors with widely diverse views; but when their work was finished they

[16] Since the "E" area restrictions were devised as an aid to housing (see p. 274). Corner lots are required to leave open 30 per cent at the curb level and 60 per cent at a level 18 feet above the curb. The provision is sec. 15 of the New York City building zone resolution printed in full on p. 316 of this work.

were, with one exception, unanimous, not only in their opinion that zoning was essential to any system of building regulation, but also in their agreement, after consideration of many and most diverse systems of zoning, to support a specific and detailed plan as best suited to accomplish the zoning of New York City. As a result of their report a second commission, chosen in accordance with the same principles, was appointed to perfect and apply the plan outlined. During the progress of their work both commissions constantly consulted with civic and business bodies and private citizens, thereby obtaining valuable information and advice and also familiarizing the public with the project, at that time so novel. The result was that the resolution and plan, with amendments in detail, largely the result of the appearance at the public hearings of the many people personally interested, but with no radical changes, were formally adopted and have ever since been regarded as an achievement of permanent value.

Importance of Zoning in New York.—The zoning of New York City is one of the great events in the history of city planning in this country; for to it in large measure is due the recent increase in zoning regulation in the United States and a stimulation of interest in it so considerable as to make it reasonably certain that zoning here will become general. Of still greater service has been the systematic character of that zoning. To it is due the fact that everywhere in this country the endeavor is made, in a scheme of bulk and use regulation covering the entire city and conforming to local conditions existing and desired, to relate each district to each of the others in the unity of the city as a whole. Such zoning is real city planning.[17]

[17] Typical of the feeling of city planners with regard to the New York resolution is the following statement of a Philadelphia official and expert made in 1917, while engaged in preparing a zoning ordinance for that city:

"In carrying on the work, the trail blazed by the New York Commission has been followed in a general way, notwithstanding the warnings of some of the New York experts; for, after a study of about everything that has been done and written in this country in reference to zoning, we have felt that most of it outside of New York has been done hastily without sufficient preliminary study or consideration, and from such individualistic viewpoints that, unless there is a more general recognition of certain underlying principles and greater uniformity in practice, the

Faults of New York Zoning.—Admirable as the New York zoning resolution is in general method and fundamental principles, it is open to criticism in many details. To what extent the work of the commission could have been better done is a disputed question. Some of the friends of zoning in New York who supported the zoning resolution most strongly endeavored, while its final form was still in doubt, to secure changes in it which have ever since been generally regarded as desirable. Certainly, however, some of its shortcomings are due not so much to the fact that it is pioneer work as to the conditions with which the zoners had to deal. This the New York zoners were the first to point out, feeling as they did that "New York has sinned so greatly in the past that its districting has had to be based altogether too much on congested sky scrapers and tenement house conditions." "Other cities can do better than we [New York] and will be most culpable if they fail to do so." [18]

Improvements on New York Zoning in Later Regulations.—It is fortunate for the future of zoning in this country that many other cities have recognized not only the virtues but the defects of the New York resolution, and have corrected some of its mistakes.

The Industrial District.—In the New York resolution there is only one class of industrial district; in later ordinances there are usually two, one for light industry which is less objectionable, and the other for heavy industry, most in need of segregation.

The Single Family House District.—In the New York resolution there is only one class of residential district, in which both the one-family house and the tenement are allowed. The importance to family life and character, of the house which the family has to itself is generally admitted, and the fact that

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progress of zoning will be obstructed by the misguided zeal of its best friends."

It must be remembered that in 1917, the excellent work of so many other cities, now done or well under way, was not available; the reference to the zoning elsewhere being to that done before the New York resolution was passed.

[18] *The American City* for June and August, 1916.

the tenement drives out the single house in any section where the tenement comes, seems clear. In the New York resolution although there is no district in which there are specific provisions protecting the one-family house, the "D" districts were created in the attempt, the success of which remains to be seen, to require so much open space that in them it would not be profitable to erect tenements.[19]

The fact that the one-family house is much less common in New York than in other communities would seem to render its protection more imperative; but the specific protection for it was omitted in the New York ordinance partly because they were so few and partly because it was feared that the one-family district would not be supported by the courts. The later decisions on this point given elsewhere [20] tend to show that the New York zoners in this respect were ultra-conservative, although no student of the subject can deny that there were grounds for it at the time, or claim that as yet the question is conclusively settled except in the few jurisdictions where the

[19] The "D" and "E" area districts were intended for residence. In the "E" districts, in so far as they are also residence districts, buildings must be at least semi-detached, 50 per cent of interior and 30 per cent of corner lots being left open at the curb level and 70 per cent and 60 per cent 18 feet above that level. The "E" districts were, however, comparatively few in number and the restrictions were imposed practically in every case with the consent of the land owners of the districts in question. The commission relied principally on the "D" district to fill the need of a district in which the one-family house was protected. This is shown by the statement in their tentative report, that the "D" district "is intended generally for one and two-family houses, either singly or in rows. Apartments, however, are not excluded but are handicapped by restrictions as to percentage of lot that may be occupied and size of yards and courts." In "D" districts, at the curb level, interior lots are required to leave 40 per cent, corner lots 20 per cent, of their area open and certain requirements as to courts and yards are made. At the public hearing on the adoption of the resolution as a whole, it was pointed out that in such a district a five story tenement could be built covering the permissible sixty per cent of the lot, which would accommodate with only 560 square feet each, twenty-five families. It is to be feared that the "handicap" is too slight to accomplish the purpose intended. Unquestionably tenements are needed in a city like New York; probably they will always be the prevailing type of residence there; no doubt the zoning regulations should be adapted to that fact; but, all the more, in every practicable way, other types of residence should be encouraged or at least protected, and variety and flexibility stimulated.

[20] See p. 288.

courts have had occasion to pass on it under modern ordinances or where it is authorized by constitutional amendment.[21]

Without awaiting such decisions, many other communities where the single family house was the prevailing type of residence have adopted the one-family house district, feeling that zoning would fail of one of its main purposes if that type of dwelling were not safeguarded.

Faulty Bulk Regulations.—It is perhaps especially in its bulk limitations that zoning in New York City is open to criticism.[22] It was no doubt inevitable that buildings in certain districts should be allowed to attain to great heights, and to occupy a very large proportion of the lot on which they were erected; but hardly necessary that the height and area limits in the rest of the city should be as high as they are. In this respect other cities have, all too much, followed New York. On the Pacific Coast, however, these restrictions seem to be more adequate. This is illustrated by a comparison of the existing conditions and the height limitations in Brooklyn, New York, and in Alameda, California. Under the New York resolution over large areas in Brooklyn, buildings can be constructed to a height equal to one and a half times the width of the street on which they abut; which on a typical sixty-foot street is the equivalent of eight or nine stories. Most of the areas where this rule applies are now developed with three or four story buildings. Nowhere, in a city with vast areas still undeveloped, is a height limit imposed less than the equivalent of once the street width; with the right to go higher if a set-

[21] It is suggested by those who question the right of the city, under sec. 242b of its charter, and statutes in other jurisdictions, to create one, or one and two-family districts that the power is given to "regulate and restrict the location of trades and industries" thus creating a general residence district by requiring trades and industries to locate elsewhere. But if the power is also given to regulate and restrict "the location of buildings designed for specified uses" why are not one-family houses, and multi-family houses, uses, each of which may be regulated and restricted so as to form separate districts?

[22] See on the subject a pamphlet issued by the City Club of New York at the time the New York resolution was pending before the Board of Estimate of the city entitled "Protecting the Future of New York," reprinted in the report of the Commission on Building Districts and Restrictions, p. 204.

back is made.[22a] Restrictions like these, which no one wishes to exceed, are not in fact restrictions at all. In Alameda most of the city built up with two and a half story houses is restricted to two and a half stories. It is a significant fact in this connection that men own their homes in Alameda as a rule, and in New York City only as a rare exception.[23]

[22a] Upper Fifth Avenue has recently been made a three-quarter district. The avenue is one hundred feet wide, permitting a building height, at the street line, of seventy-five feet.

[23] In this connection the work of the architect Andrew J. Thomas of New York is of interest. Some years ago Raymond Unwin, the English city planner, wrote a pamphlet for the Garden City and Town Planning Association entitled *Nothing Gained by Overcrowding* (P. S. King & Son, London, 1912). Mr. Unwin shows that the effort of the developer of real estate to obtain the maximum financial return from a given tract of building land often results in an intensive utilization of it at the expense of an amount of costly roadway so excessive as to defeat his object. Mr. Thomas has proved that nothing is gained by overbuilding. In one of the outlying boroughs of New York City accessible to the city center, in a zone where at most seventy per cent of interior and ninety per cent of corner lots may be covered, Mr. Thomas has built apartments five and six stories in height, occupying a large fraction or all of a city block. These apartments, covering forty-five per cent of the lot, yield a larger net return than apartments in the same neighborhood of the same height, costing the same amount per cubic foot, on land of the same value, renting for the same price per square foot, which cover seventy per cent of the lot. In smaller units this principle also holds true although the percentage of lot area which can be covered economically may be higher. This result is due to Mr. Thomas's plan which not only gives his tenants more light, air, and recreation space, but obtains the same rentable area with less gross cubage.

The bearing of these facts upon the zoning of New York City is obvious. Apparently it will be possible not too far from the center of the city, in all the boroughs except perhaps Manhattan, to convert considerable portions of many of the seventy per cent zones into zones where perhaps fifty per cent is the maximum percentage of the lot that may be covered—possible because it can be done not only with great gain to the public but without injustice to the land owner.

The possible effect of Mr. Thomas's work on land sub-division is also interesting. The New York City tenement house law made it practically impossible any longer to build apartments on the lot twenty-five feet wide; Mr. Thomas may be able to convince the builder that the unit, in tenement house neighborhoods, should be the block or a considerable fraction of it, and in its turn the wider single lot unit in these neighborhoods would go out of use.

See, with relation to Mr. Thomas's work, *Garden Apartments in Cities*, by John Taylor Boyd, Jr., New York 1920, reprinted from the "Architectural Record"; *Is it Advisable to Remodel Slum Tenements* by Andrew J. Thomas, with comment by Robert D. Kohn, reprinted for the National Federation of Settlements from the "Architectural Record," New York, November, 1920, pages 417 to 426; and *The New York Zoning Resolution and its Influence upon Design*, in the "Architectural Record," vol. 48, pp. 193-217. All these articles contain plans and illustrations.

Original Features in Later Ordinances.—Not all the variations in later ordinances from the New York model are corrections of more or less obvious shortcomings; some of them are new ventures in the field of zoning. In some ordinances recently passed a new area limitation, varying by districts, which restricts the number of families that may be housed on an acre or given fraction of it has been adopted.[24] The avowed purpose of this limitation is to decrease congestion—an altogether worthy one. The same object could be attained by increasing the requirements with regard to open space. It cannot be regarded as settled which of these methods of reaching the same general result will secure the best results.

In one or two ordinances residences are altogether excluded from the heavy manufacturing districts,[25] as is sometimes done in Germany.[26] If the district is kept small, this may be altogether advantageous; although it would seem to involve the creation of a neighboring district, devoted to housing, which could be made industrial later, if expansion of the original industrial district became necessary. If, however, the industrial district is large enough to allow expansion, it would be a hardship and an economic waste to keep the owners of land from using it (until needed for manufacturing) for the only purposes for which it could be utilized.

On the Pacific Coast the tendency of zoners is to create a greater number of use districts than is ever found in the East. Most interesting there are the districts for public and semi-public buildings, often limited in area to the lot a particular building occupies. In other systems, in so far as such build-

[24] See, for instance, secs. 26.63 and 26.64 of the Milwaukee ordinance, given in full on p. 323 of this work. Recent statutes in some cases (Laws, Mich. 1921, No. 207, sec. 3; Mo., 1921, p. 481, sec. 3, approved April 1) expressly authorize localities to include such a provision in their zoning ordinances. Milwaukee, however, and other cities in states in which there is no such express authorization, have enacted such a provision in their zoning ordinances, and would seem to be justified in doing so under the power, which their state laws do give them, to pass area zoning regulations.

[25] See, for instance, the Alameda ordinance, art. 1, sec. 10, given in full on p. 341 of this work; or sec. 5 of the Newark, New Jersey ordinance.

[26] See p. 214.

ings are zoned, they are merely assigned to some district without being definitely placed, or are located by special license.

A recent ordinance for a small municipality which is practically a residential suburb of a neighboring metropolis,[27] excludes heavy industry entirely from the municipality. If the suburb should be zoned in this way in a zone plan for the entire metropolitan area, it is difficult to see why it should not be so restricted in a zone plan for the suburb alone. Evidently in many respects zoning theory in this country is still in process of evolution.[28]

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[27] White Plains, N. Y. Another method of accomplishing the same result is to establish, as the sole heavy industry district, areas already fully occupied and therefore incapable of receiving other industrial establishments.

[28] In 1916 the City Club of New York advocated the creation of a fourth or semi-residential use class in New York City, to consist of business on the ground floor and residences above; see *Report of Commission on Building Districts and Restrictions,* New York City, 1916, pp. 93, 206, 209. This development is common in big cities, the buildings sometimes being very expensive apartments, but more often moderate and low priced tenements. In territory classified as business districts, residence is afforded little protection, and yet the great mass of tenement dwellers must live in them. There is no reason to question the legality of zoning along horizontal any more than along vertical lines, if for the public interest. Such a district has been provided for in the Elizabeth, New Jersey, zoning ordinance, adopted in 1922.

Port Zoning.—The Port Committee of the City Club of New York, in a report dated July 2, 1918, made the following suggestion with regard to the zoning of the port of New York:

THE COÖRDINATION OF THE PLAN OF THE PORT WITH THE GENERAL CITY PLAN BY THE DEVELOPMENT OF A SYSTEM OF ZONING.

The water's edge should be zoned with the same basic principles as governed the adoption of the zone system for the city's uplands. It is quite as important that similar industries using the same type of factories, serving a similar clientele, and delivering goods to the same warehouses and factories be located together as it is that residences, industrial and business buildings be grouped.

The economical development of the Port requires the coördination of the uplands with the nearby piers. There can be no permanency to the plan of the Port until a complete system of zoning has been developed.

Zoning of the Port of New York should

1. Prevent useless hauling and handling of freight by developing union classification and transfer yards outside of the Island of Manhattan.

2. Relate docks to receiving and classification yards so that so far as possible steamers may be loaded directly with a minimum of lightering of cargo.

3. Provide for the development of warehouses in connection with the classification yards and piers for the temporary holding and classification of goods in transit.

Discretionary Powers.—There is a tendency at present to make the location, extension and change of structures of many sorts and the uses in them dependent upon the consent of the officials administering the ordinance. It has always been regarded as inexpedient in this country to give discretionary powers to those in authority when it is possible by statute or ordinance, or rules under them, to lay down general principles governing the matter; and it should not be forgotten that, unless a structure or a use is objectionable or may be so if not regulated, limitations of this sort with relation to it may be illegal.[29]

Establishing Setbacks by Zoning.—In many zoning ordinances there are provisions for the establishment of front, side and rear setbacks, varying in the different districts. There are many decisions with regard to setbacks, employed before the days of zoning in this country, holding that a setback cannot be imposed under the police power and without compensation.[30] These setbacks were, it is submitted, radically different from the setbacks now contemplated. The pre-zoning setback of these decisions requires the land owner to leave a given part of his land open; the zoning setback in effect merely prescribes the location of a part of the space which must be left open irrespective of the setback. The pre-zoning setback, affecting as it does a strip of land of the same width irrespective of the size and shape of the lot, is a burden which bears unequally upon the owners of lots of different sizes and shapes; the zon-

4. Provide facilities for store door delivery wherever possible.
5. Relate the wholesale food markets to transportation systems and with each other.
6. Develop types of piers adopted for various classes of business.
7. Develop grain and other bulk cargo terminals with modern machinery.
8. Preserve parts of the Port near dwellings and not needed for commercial uses for park purposes.

[29] McQuillin, *Municipal Corporations,* sec. 728, and same section in supplement issued in 1921; see also Ingham v. Brooks et al., 95 Conn. 317, and reference to same in Windsor v. Whitney et al., 95 Conn., 357 (1920); Smith v. Hosford, 106 Kans., 363 (1920); Village of South Orange v. Heller, 92 N. J. Eq. Rep. 505 (1921). With regard to the tendency, equally dangerous, of making the application of zoning regulations dependent altogether upon the consent of property owners, see above, p. 266.

[30] St. Louis v. Hill, 116 Mo. 527 (1893); Fruth v. Board of Affairs, 75 W. Va. 456 (1915).

ing setback, since it does not increase the required percentage of open space on the lot, if a burden, is equal for all; or if unequal does not require more than the minimum open space necessary for health. The pre-zoning setback is an isolated provision; the zoning setback, especially if a part of a comprehensive scheme, is an element of a plan for the general advantage. It seems reasonable to suppose that, if zoning is valid at all, such setbacks imposed under the police power as a part of a zoning system will be upheld by the courts.[31]

Zoning under Police Power.—It is a practical necessity that zoning be done under the police power of the state, without compensation. In a few cases, statutes have been passed authorizing zoning by eminent domain, with damages to those claiming to be injured, to be assessed upon those benefited.[32] Under these statutes little or no zoning has been done; all the zoning regulations having employed the police power. The reason for this is apparent. Zoning regulations for any given community cover a broad expanse of territory and affect a vast number of interests. Under eminent domain proper notice must be served in due form on each of the parties in interest, and each must be given the usual opportunity of presenting his case for damages. In spite of the fact that, as a rule, there are no damages, or that, if there are, they may be collected from other property owners by other proceedings in due legal form, there remain the delays always incident to such proceedings, which in this case would be numerous and expensive; and the claims for damages, which, whether justifiable or not, must be disposed of at the same cost of time and money. Moreover, the same right to claim damages would accrue to the landowner whenever there was a change in the regulations or the districts created under them. This would render modifications in the system, needed to adapt it to development and growth in the community, practically impossible,

[31] For an example of such setbacks, see secs. 26.62, 26.63 and 26.64 of the Milwaukee ordinance, given in full on p. 323 of this work; also Cleveland, Ohio, Ordinance No. 52247-AB (passed Dec. 6, 1920), especially interesting because of the provisions for a board of appeals to vary its terms.

[32] See Tables of Statutes.

and thus stereotype any zoning that the community succeeded in obtaining, making it a very doubtful blessing. Practically, therefore, zoning must be done by the simpler methods possible under the police power, in which every owner can and should be given an opportunity to be heard, without the expenses, formalities or delays of legal proceedings.[33]

Power of Local Governments to Zone.—A local government, in order to pass valid zoning ordinances, must possess the police power of the state in sufficient measure for the purpose. Local governments in this country have only such powers as the state has given them. In some states the constitution or statutes grant more or less generously to local communities the power to enact ordinances for their general welfare, thus endowing them with the police power for local uses. This general grant may be sufficient to permit the locality in question to zone; and certainly is so if the community has the full police power in local matters. It is, however, becoming more and more the custom to pass laws explicitly conferring the power to zone; and it should not be forgotten that this fact is rapidly raising a strong presumption in law that a community cannot zone without such express statutory authority.

Constitutionality of Zoning.—Building regulations under the police power of necessity limit the land owner more or less in the use of his land; and for these limitations no compensation is provided. The validity of such regulations, whether they are the same for the entire city or vary by districts, is dependent upon the question whether they are constitutional.

The police power may be used for the promotion of the public health, safety, morals and order, and for the general welfare. Health, safety, morals, and order are words of definite meaning and comparatively limited content, and their

[33] The first Illinois zoning law (approved June 28, 1919) unlike any other making use of the police power, made elaborate provision for personal notice to each property owner affected, much as, of necessity, is done under eminent domain. For this reason the statute was regarded as unworkable by many, and a new statute (1921, p. 180; approved June 28) has now been passed. No zoning was ever done under the statute of 1919.

New York has just passed a statute containing a similar requirement (1922, ch. 322) for the establishment of building lines and the zoning of those parts of towns in Westchester County, outside incorporated villages.

promotion is vital to the state. General welfare is a looser expression and measures to preserve or increase it are more carefully scrutinized by the courts.

For many years cities have passed regulations of the height, area and use of buildings which are the same throughout the city; and the courts have accepted proper regulations of this sort as valid. It is only when these regulations vary in different parts of the city that their legality is still in any doubt.

Reasonableness.—Evidently a zoning regulation, to be authorized under the police power, like any measure claimed to be an exercise of any power, must first tend in a sufficient degree to accomplish a purpose justifiable under that power, and secondly be free from excess, unreasonableness or similar element. Thus a given height regulation, to be upheld as a police regulation by the courts, must materially promote the public health, safety, order or general welfare by conserving light or air, or preventing congestion, etc., and must not be so drastic as to lower land values unduly or be otherwise unreasonable. Zoning regulations, however, are challenged for the additional reason, not applicable to the others, that they do not afford to all the equal protection of the laws guaranteed by our constitutions.

Classification.—It is well settled in our law that the provision for equal protection of the laws does not prevent reasonable classification. If all persons and things were, in nature and situation, absolutely alike, equality of treatment would be secured only by identical laws for all. Evidently, however, the differences in nature and situation, which are so general, permit and even require differences in the law in obtaining such equality. Uniformity of law under such circumstances would be like furnishing all men, fat and thin, tall and short, with clothing of the same size, when equal treatment would demand such variations as would give each a suit that would fit him; or like offering rich and poor clothing of the same material and price, when equality requires such differences as will give each the clothing he can afford.

In accordance with this principle, the courts have sustained laws for tenement houses subjecting these structures, in

which the danger of disease and fire is greater, to more stringent limitations than one and two family houses; and height regulations varying with the width of the street on which the buildings are to be erected, thereby tending to secure in each an equal supply of light and air; and fire limits in which buildings of fire-resisting material must be constructed at greater expense than in the other parts of the city where the fire risk is less.

Although not usually recognized as such, regulations establishing fire limits and restricting the height of buildings in accordance with the width of the streets on which they are to stand, which have universally received the support of the courts, are really zoning measures. The same considerations demand the same support for the more fully developed zoning which the city planners of today are advocating. Thus the central business parts of the city, to facilitate the quick transfers of business, require higher buildings, covering more of the lot, than the outlying sections; and conversely the outlying residential districts need lower buildings, with more space around them for the comfort and health of adults, and especially for growing children. Modern science has established the fact that human beings need abundance of sun, light and air, and freedom from nerve-racking noise, to a degree that it is impossible to obtain in the manufacturing and business parts of modern cities; and experience, especially perhaps that of the English garden cities, tends strongly to confirm these scientific facts; which, indeed, are in accordance with common observation and common sense. If, therefore, these conditions cannot be obtained in the business and industrial parts of cities, it is all the more necessary that they be furnished in greater abundance and completeness in other sections. Moreover the types of buildings prevailing in the two sections and the land prices in each of them, make the varying regulations more equal in burden and effect than identical limitations would be.

In the same way use regulations varied to suit the various uses prevailing and suitable in the various parts of the city, properly conceived and applied, are measures of equality and not of discrimination. Thus if it were required that both land

accessible to the railroads and land on the remoter hills of a city should be used for the same purpose, whether for business or for residence, there would be a glaring inequality of treatment. It may be claimed in zoning that any given regulation is inappropriate or unwarrantably severe; but, like all legislation, it must be devised with knowledge and skill.

Decisions on Zoning.—Until recently the courts in their decisions with regard to zoning [34] have passed upon specific

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[34] DECISIONS ON ZONING

The judicial decisions in favor of or against the validity of ordinances in this country creating various classes of zoning districts are given below. Among them are (1) cases in which the exclusion of a use from a given district is more or less dependent upon the consent of the property owners of that district. These cases are marked with a star (*). The validity of consent ordinances as such is considered on p. 266; (2) billboard cases, marked with a dagger (†); garage cases, marked with a double dagger (‡); cases with regard to zoning under statutes relying upon the power of eminent domain, with regard to which that fact is stated, in all the other cases the zoning being under the police power.

SYSTEMATIC AND COMPLETE ZONING

California.—See Brown v. City of Los Angeles (1920), 183 Cal. 783, 192 Pac. 716.

District of Columbia.—See Schwartz v. Brownlow (1921), 50 App. D. C. 279, 270 Fed. 1019.

Massachusetts.—Opinion of Justices (1920), 234 Mass. 597, 127 N. E. 525.

Missouri.—See City of St. Louis v. Evraiff and Friedman, Mo. Sup. Ct., Oct. Term, 1921.

New Jersey.—See Cliffside Park Realty Co. v. Borough of Cliffside Park (1921), 114 Atl. 797.

New York.—Lincoln Trust Co. v. Williams Bldg. Corp. (1920), 183 App. Div. 225, 229 N. Y. 313.

Ohio.—People ex rel. Morris v. Osborn (1920), 22 Ohio N. P. (N. S.) 549.

HEIGHT DISTRICT

Maryland.—See Cochran v. Preston (1908), 108 Md. 220.

Massachusetts.—Welch v. Swasey (1908), 193 Mass. 364, 214 U. S. 91.

New Jersey.—See Romar Realty Co. v. Board of Commissioners (1921), 114 Atl. 248.

ONE, AND ONE AND TWO-FAMILY HOUSE DISTRICTS

Colorado.—See *Willison v. Cooke (1913), 54 Col. 320, 130 Pac. 828.

Kentucky.—See McMurtry v. Phillips Investment Co. (1898) 103 Ky. 308, 45 S. W. 96; Struck v. Kohler (1920), 187 Ky. 517, 219 S. W. 435.

Maryland.—*Contra,* Byrne v. Md. Realty Co. (1916), 129 Md. 202, 98 Atl. 547.

Massachusetts.—Opinion of Justices (1920), 234 Mass. 597, 127 N. E. 525.

Minnesota.—State ex rel. Twin City Bldg. and Investment Co. v. Houghton (1919), 144 Minn. 1, 174 N. W. 885, 176 N. W. 159 (eminent

domain); *contra*, State ex rel. Roerig v. City of Minneapolis (1917), 136 Minn. 479, 162 N. W. 477.

Nebraska.—See, State ex rel. Westminster Presbyterian Church of Omaha v. Edgecomb, Chief Eng. Bldg. Dep., City of Omaha, pending in State Supreme Court.

New Jersey.—See Blakeslee v. Jersey City (1921), 95 N. J. Law Rep. 284, Handy v. Village of South Orange (Feb. 21, 1922), — Atl. —.

New York.—See Reformed P. D. Church v. M. A. Bldg. Co. (1915), 214 N. Y. 268.

Ohio.—State ex rel. Morris v. Osborn (1920), 22 Ohio N. P. (N. S.) 549.

Oregon.—See State v. Plummer (1920), 97 Ore. 518, 189 Pac. 405, 191 Pac. 883.

GENERAL RESIDENCE DISTRICT, BUSINESS EXCLUDED

Colorado.—*Contra*, Willison v. Cooke (1913), 54 Col. 320, 130 Pac. 828.

Illinois.—*Contra*, * People ex rel. Friend v. City of Chicago (1913), 261 Ill. 16, 103 N. E. 609.

Louisiana.—*Contra*, Calvo v. City of New Orleans (1915), 136 La. 480, 67 So. 338; State ex rel. Blaise v. New Orleans (1917), 142 La. 73, 76 So. 244.

Maryland.—*Contra*, Stubbs v. Scott (1915), 127 Md. 86, 95 Atl. 1060 (automobile salesroom).

Minnesota.—*Contra*, State ex rel. Lachtman v. Houghton (1916), but see State ex. rel. Twin City Bldg. and Investment Co. v. Houghton (1919), 144 Minn. 1, 174 N. W. 885, 176 N. W. 159; (eminent domain) see Roerig v. Houghton (1919), 144 Minn. 231, 175 N. W. 542.

Missouri.—*Contra*, St. Louis v. Dorr (1898), 145 Mo. 466.

New York.—See Whitridge v. Calestock (1917), 100 Misc. 367, 165 N. Y. Supp. 640, 179 A. D. 884.

Texas.—Spann v. City of Dallas (1916), 189 S. W. 999.

GENERAL RESIDENCE DISTRICT, NUISANCES, MANUFACTURING, ETC., EXCLUDED

Arkansas.—Reinman v. Little Rock (1913, 1915) 107 Ark. 174, 237 U. S. 171 (stable); Pierce Oil Co. v. Hope (1917, 1918) 127 Ark. 38, 248 U. S. 498.

California.—Ex Parte Quong Wo (1911) 161 Cal. 220, 118 Pac. 714 (laundry); Barbier v. Connolly (1884) 113 U. S. 27 (laundry). In re Montgomery (1912) 163 Cal. 457, 125 Pac. 1070 (lumber yard); Ex Parte Hadacheck (1913) 165 Cal. 416, 132 Pac. 584 (brickyard); Hadacheck v. Sebastian (1915) 239 U. S. 394 (brickyard); Curtis v. City of Los Angeles (1916) 172 Cal. 230, 156 Pac. 462 (stable); Boyd v. City of Sierra Madre (1919) 41 Cal. App. 520, 183 Pac. 230 (stable); Brown v. City of Los Angeles (1920) 192 Pac. 716 (undertaker); Sam Kee v. Wild (1919) 183 Pac. 164 (laundry).

Delaware.—‡* Myers v. Fortunato (1920)—Del. 110 Atl. 847; *Contra.*—‡* Dangel v. Williams (1916) 11 Del. Ch. 213.

Idaho.—Bacon v. Walker (1907) 204 U. S. 311 (sheep).

Illinois.—City of Chicago v. Stratton (1896) 162 Ill. 494, 44 N. E. 853 (stable); Standard Oil Co. v. Danville (1902), 119 Ill. 50, 105 N. E. 15. * Smolensky v. City of Chicago (1917) 282 Ill. 131 (junk shop); *‡ People ex rel. Buschling v. Ericsson (1914) 263 Ill. 368, 105 N. E. 315. *‡ People ex rel. Keller v. Village of Oak Park (1914) 266 Ill. 365, 107 N. E. 636; *† Cusack v. City of Chicago (1914-17) 267 Ill. 344, 108 N. E. 340, 242 U. S. 526; *Contra.*—*People ex rel. Goldberg v. Busse (1909) 240 Ill. 338, 88 N. E. 831 (junk shop).

Indiana.—Shea v. City of Muncie (1897) 148 Ind. 14, 46 N. E. 138 (saloon).

Iowa.—Shiras v. Olinger (1879) 50 Iowa 571 (stable); N. W. Laundry Co. v. Des Moines (1916), 239 U. S. 486 (dense smoke); *‡ City of Des Moines v. Manhattan Oil Co. (1921), 184 N. W. 823.

Minnesota.—Meyers v. Houghton (1917) 137 Minn. 481, 163 N. W. 754; Meagher v. Kessler (1920), 147 Minn. 182 (undertaker); State ex rel. Banner v. Houghton (1919), 142 Minn. 28, 170 N. W. 853; City of St. Paul v. Kessler (1920) 146 Minn. 124, 178 N. W. 171 (undertaker).

Missouri.—* City of St. Louis v. Russell (1893) 116 Mo. 248 (stable).

New Jersey.—‡ Village of South Orange v. Haller (1921)—N. J.—, 113 Atl. 697; see ‡ Blakeslee v. Mayor and Aldermen of Jersey City (1921) 95 N. J. Law 284, 112 Atl. 593.

New York.—Matter of Russell (1916) 158 N. Y. Supp. 162.

Washington.—City of Spokane v. Camp (1908) 50 Wash. 554, 97 Pac. 770 (stable).

BUSINESS DISTRICT

Arkansas.—‡ Reinman v. Little Rock (1913-15) 107 Ark. 174, 237 U. S. 171 (stable).

California.—Barbier v. Connolly (1884) 113 U. S. 27 (laundry).

Illinois.—*Contra,* People ex rel. Goldberg v. Busse (1909) 240 Ill. 338, 88 N. E. 831 (junk shop).

Missouri.—St. Louis v. Russell (1893) 116 Mo. 248, 22 S. W. 47¢ (stable).

See also Town of Cuba v. Mississippi Oil Co., 150 Ala. 259, 43 So. 706 (1907); Coon v. Board of Public Works, 7 Cal. App. 760 (1908); Varney & Green v. Williams, 155 Cal. 318 (1909); Nahser v. City of Chicago, 271 Ill. 288 (1916); City of Hammond v. Calumet C. & S. Co., 262 Fed. 938 (1920; Ind.); Shiras v. Olinger, 50 Iowa 571 (1879); Williams v. Wolfgang, 151 Iowa 548 (1911); Osborne v. Grauel, 136 Md. 88 (1920); Hays v. City of Poplar Bluff, 263 Mo. 516 (1914); Watertown v. Mayo, 109 Mass. 315 (1872); Quintini v. Board of Aldermen, 64 Miss. 483 (1886); People ex rel. Corn Hill Realty Co., 209 N. Y. 434; 103 N. E. 735 (1913); Hall v. House of St. Giles the Cripple, 154 N. Y. Supp. 96 (1915); City of Rochester v. West, 164 N. Y. 510 (1900); West Side Mort. Co. v. Leo, 174 N. Y. Supp. 451 (1919); Walcher v. First Presbyterian Church, 76 Okla. 9, 184 Pac. 106 (1909); State ex rel. Omaha Gas Co. v. Withnell, 78 Neb. 33 (1907); State ex rel. Krittenbunk v. Withnell, 91 Neb. 102; 135 N. W. 376 (1912); State v. Whitlock, 149 N. C. 542 (1908); Coyne v. Prichard (Penn.) 116 Atl. 315 (1922); State of Tennessee v. Newton, 3 Tenn. Civ. App. 93 (1912); City of Olympia v. Mann, 1 Wash. 389 (1890); Fruth v. Board of Affairs of Charlestown, 75 West Va. 456; 84 S. E. 105 (1915); State ex rel. Nehrbass v. Harper, 162 Wisc. 589 (1916).

Cases with relation to procedure:

District of Columbia.—‡ Weeks v. Heurich (1913), 40 App. cas. D. C. 46.

New Jersey.—Cliffside Park Realty Co. v. Borough of Cliffside Park (1921), 114 Atl. 797.

New York.—Whitridge v. Park (1917) 165 N. Y. Supp. 640; 179 App. Div. 884; 100 Misc. 367; Anderson v. Steinway (1917), 178 App. Div. 507; 221 N. Y. 639; Whitridge v. Calestock (1917) 100 Misc. 367; 165 N. Y. Supp. 640; 179 App. Div. 884; People ex rel. Flegenheimer v. Leo (1918), 186 App. Div. 893; People ex rel. N Y. Central R. R. v. Leo (1918), 105 Misc. 372; 173 N. Y. Supp. 217; People ex rel. Broadway and 96th St. Realty Co. v. Miller, *N. Y. Law Journal,* Nov. 1, 1921; Moss v. Ruben Stern, *N. Y. Law Journal,* Dec. 29, 1921; People ex rel. Sheldon v. Bd. of App., 115 Misc, 449, Affd., 192 N. Y. Supp. 945 (1922); Albany Heights Realty Co. v. Vogt (1918), 182 App. Div. (N. Y.) 736; 169 N. Y. Supp.

zoning provisions and not on zoning as a whole. Thus the Massachusetts courts, sustained by the Supreme Court of the United States,[35] have upheld a height zoning provision. There seems to be no difference in principle between zoning by height and zoning by area. It has for some time therefore been regarded as reasonably certain that proper bulk zoning is constitutional. State courts, sustained by the Supreme Court of the United States, have also held that manufacturing [36] or other enterprises which on any reasonable ground may be deemed

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1049; People ex rel. Beinert v. Miller (1919), 100 Misc. 318, 188 App. Div. 113; 165 N. Y. Supp. 602; People ex rel. Sondern v. Walsh (1919), 108 Misc. (N. Y.) 193, 196; People ex rel. Wohl v. Leo (1919), 109 Misc. 448, 178 N. Y. Supp. 85; ‡ People ex rel. Small v. Leo (1919), 178 N. Y. Supp. 239; People ex rel. McAvoy v. Leo (1919), 109 Misc. 255; 178 N. Y. Supp. 513; ‡ West Side Mortgage Co. v. Leo (1919), 174 N. Y. Supp. 451; ‡ People ex rel. Facey v. Leo (1921), 110 Misc. 516; 193 App. Div. 910; 180 N. Y. Supp. 553, 230 N. Y. 602; ‡ People ex rel. Healy v. Leo (1920), 185 N. Y. Supp. 948; ‡ People ex rel. Cotton v. Leo (1920), 110 Misc. 519, 180 N. Y. Supp. 554. People ex rel. Helvetia Realty Co. v. Leo (1921), 183 N. Y. Supp. 37; 185 N. Y. Supp. 949; People ex rel. Ruth v. Leo (1921), *N. Y. Law Journal*, March 29, 1921, p. 2195; 188 N. Y. Supp. 945; Guinness v. Forchheimer, *N. Y. Law Journal*, May 21, 1921, 190 N. Y. Supp. 929; People ex rel. Sheldon v. Board of Appeals (1921), 115 Misc. 449; 189 N. Y. Supp. 772.

Ordinances Must Be Reasonable.—San Diego Tuberculosis Hospital v. City of East San Diego, 200 Pac. 393 (1921); State ex rel. Westminister Presbyterian Church of Omaha v. Edgecomb, Chief Eng. Bldg. Dept. City of Omaha, pending in State Supreme Court; Handy v. Village of South Orange (Feb. 21, 1922)—Atl.—; People ex rel. Wineburgh Adt. Co. v. Murphy, 195 N. Y. 126 (1909); Bonnett v. Vallier, 136 Wis. 193 (1908). *Piecemeal Zoning.*—See Brown v. City of Los Angeles, 192 Pac. 716 (1920). *Definition of Use.*—People ex rel. Wohl v. Leo, 109 Misc. 448, 178 N. Y. Supp. 851 (1919). With regard to revocation of permit granted before passage of ordinance, see City of Des Moines v. Manhattan Oil Co., 184 N. W. 823 (1921).

Exclusion cannot be on ground that building does not conform to character of buildings in neighborhood, and does tend to depreciate the value of surrounding property. Bostock v. Sams, 95 Md. 400 (1902).

Police power may be used to promote general comfort, convenience and prosperity. Lake Shore, M. S. and S. Ry. Co. v. Ohio, 173 U. S. 285 (1898); C. B. & Q. Ry. Co. v. Drainage Com'rs (Ill.), 200 U. S. 561 at 592 (1906).

Zoning by race or color is invalid, under the United States Constitution: Buchanan v. Warley, 165 Ky. 559; Reversed 245 U. S. 60 (1917); see also Carey v. City of Atlanta, 143 Ga. 192 (1915); State v. Gurry, 121 Md. 534 (1913); State v. Darnell, 166 N. Car. 300 (1914); Hopkins v. City of Richmond, 117 Va. 692 (1915).

[35] Welch v. Swasey, 193 Mass. 364, affirmed, 214 U. S. 91 (1909).

[36] Ex parte Hadacheck, 165 Cal. 416 (1913), Hadacheck v. Sebastian, 239 U. S. 394 (1915); Reinman v. Little Rock, 107 Ark. 174 (1913), 237 U. S. 171 (1915).

objectionable in a residential or business neighborhood, even if not an actual nuisance, may be excluded. The legality of reasonable use zoning as a protection against manufacturing may therefore be regarded as established. Until recently the decisions in state courts with regard to regulations excluding business from residential neighborhoods (the Supreme Court of the United States has not as yet had occasion to consider the question) had been almost uniformly against their validity. The reason given was that these regulations were based upon æsthetic considerations. Certainly, as a general statement of the case for such zoning, this is most inadequate and therefore unfair. The intrusion of business into residential districts often interferes with comfort and convenience in these districts, and with health and safety, especially of children; as is shown by a drop in land values. As an isolated provision, a measure barring business from such districts might well be considered as a taking of property rights from one land owner for the advantage of others. If, however, business is excluded as a part of a complete and well-considered plan, which includes all the land in the city in its various provisions, and assigns to business its proper place, for its own good as well as the advantage of others, residential land is benefited certainly without loss to business property, and, as a rule, to its gain. None of these cases were with regard to such a comprehensive plan.

Recent Decisions on Zoning.—Late judicial opinions have done much to clarify the law on the subject of zoning. They consist of a case in an inferior court in Ohio, an opinion of the Justices of the Supreme Court of Massachusetts, and a case in the Court of Appeals in New York.[37]

The East Cleveland Case.—In July, 1919, the City of East Cleveland, Ohio, passed a zoning ordinance establishing a one and two-family residence district restricted against industry, business and tenements, a general residence district re-

[37] State of Ohio ex rel. Morris v. Osborn, City Manager of East Cleveland, et al., Common Pleas Court, Cuyahoga County, decided April 30, 1920, reported in 22 Ohio Nisi Prius Reports (New Series), page 549; Opinion of Justices, 234 Mass. 597, and also House Documents (1920) No. 1774; Lincoln Trust Co. v. Williams Building Corp., 229 N. Y. 313 (1920).

stricted against business and industry, a business district and an unrestricted or industrial district. An owner of real estate in the one and two-family district applied for a permit to erect tenement houses upon it; and, when the permit was refused, appealed to the courts. For the first time, judging by the opinions, the court considered the propriety of the exercise of the police power [38] for the establishment of a private residence district as a part of systematic and complete zone plan; and in so considering it held that the police power could be employed for the purpose. If tenements can legally be kept out of any given district, so can business, as well as industry; and it follows that our present zoning plans, if in detail carefully and reasonably conceived and executed, will be sustained by the courts.

The Opinion of the Massachusetts Justices.—Alone among the states, Massachusetts has authorized the passage of zoning laws by constitutional amendment.[39] Under this amendment a statute has just been passed [40] which permits the establishment, as a part of a complete zoning regulation, of districts from which business and tenements are excluded. It was with regard to the validity of that law that the opinion of the judges of the supreme court of Massachusetts already mentioned was obtained. It seemed reasonably clear after reading the Massachusetts statute that it was in accordance with the provisions of the Massachusetts constitutional amendment. In any event the opinion of the Massachusetts Justices that it was so would not much affect the fate of districts from which the tenement was excluded, and systematic zoning, outside of Massachusetts. But the Massachusetts Justices decided also that the statute was in conformity with the Constitution of the United States, in force in every state in our Union. This, and the added fact that the provisions with regard to the taking of

[38] The exclusion of tenements from given districts under the power of eminent domain has been sustained by the courts; State ex rel. Twin City Bldg. and Investment Co. v. Houghton, 144 Minn. 1.

[39] Constitution, Amendments, art. 60.

[40] Now General Laws, 1920, ch. 40, secs. 25-30. The existence of an earlier statute (now 1920 ch. 143, sec. 3) should not be forgotten. It is in some ways more comprehensive than the later law.

property rights in the United States Constitution are similar to those in the unamended constitutions of the other states, makes the Massachusetts opinion a weighty authority for the district from which the tenement is excluded, and systematic zoning, everywhere in this country; and it is already being so cited.[41]

The New York Decision.—In New York, where systematic zoning regulations were first passed in this country, there has been litigation with regard to many phases of such zoning, but until lately none involving its constitutionality. Last July, however, such a case was decided by New York's highest court. In that case [42] the Court says:

"The [New York City Zoning] resolution divided the real estate [of the city] into three districts, 'residence district,' 'business district,' and 'unrestricted district.' The land which the defendant contracted to purchase was in the residence district. The question presented is whether the resolution constituted an incumbrance which would relieve the purchaser from its obligation to complete the purchase as provided in the contract.

"In a great metropolis like New York, in which the public health, welfare, convenience and common good are to be considered, I am of the opinion that the resolution was not an incumbrance, since it was a proper exercise of the police power. The exercise of such power, within constitutional limitations, depends largely upon the discretion and good judgment of the municipal authorities with which the courts are reluctant to interfere. . . ."

"Since this opinion was written an opinion of the justices of the Supreme Judicial Court of Massachusetts . . . has been published, which sustains the conclusion above expressed."

In the light of these opinions, proper zoning in this country would now seem to be reasonably secure against judicial attack. It must not be forgotten, however, that the police power varies with local conditions in different parts of this country; [43] and that it is not impossible that there are details or phases of zoning which will be held valid by the courts in some states but will not be so sustained in others.

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[41] In Lincoln Trust Co. v. Williams Building Corp., 229 N. Y. 313 (1920).

[42] Lincoln Trust Co. v. Williams Building Corp., 229 N. Y. 313, just cited.

[43] See p. 20.

Pacific Coast Zoning.—Even the most hopeful advocate will admit that there are many questions with regard to zoning which remain unanswered. For this reason, until the law has become better settled, it especially behooves zoners and city officials to proceed with care. On the Pacific Coast, zoning ordinances create from eight to twelve classes of district, instead of the four or five usually to be found in other parts of the country.[44] There is no reason to suppose, and certainly none to hope, that zoning has become stereotyped in this country; but on the contrary changes are to be expected and desired. The Pacific Coast districts, however, seem to lack those broad lines of demarcation, those solid reasons for existence which alone will justify them before our courts and, in the long run, with the community as a whole. Certainly the prudent zoner in the East and Middle West, for the immediate future at least, will avoid such elaborate classification. Even the law and practice with regard to the comparatively conservative one-family detached house district is still in a most unsettled condition.

Unsettled Legal Questions in Zoning.—The courts have given some support to the hope that private residence districts may legally be established. Where shall the line be drawn between them and the less private district? The cases are too few for us to obtain from them definite information on the subject. Certainly the line must be based upon some distinction of importance. Under some zoning ordinances two family districts have been created; and the tenement, and in some

[44] The zoning statutes of California (1917, ch. 734, p. 1419) expressly provide that:

"Sec. 2. The council may by ordinance regulate, restrict and segregate the location of industries, the several classes of business, trades or callings, the location of apartment or tenement houses, club houses, group residences, two-family dwellings, single family dwellings and the several classes of public and semi-public buildings, and the location of buildings or property designed for specified uses, and may divide," etc.

The Oregon Zoning Statute (Revised Laws 1920, sec. 3874, passed in 1919) practically identical with that of California throughout, is the same in this respect. As yet there are no decisions with regard to the constitutionality of either of these laws. With regard to such zoning, see also pp. 267, 272, 275, 277, 292.

For a statement of the Pacific Coast point of view in zoning from the pen of the man who perhaps has done more of it than anyone else, see "Zoning in Practice" by Charles H. Cheney, in the *National Municipal Review* for January, 1920.

cases the three decker, barred. If this line is drawn on the basis of congestion, either expressly, or indirectly by resort to height and area restriction, it is easy to see how it may with some confidence be regarded as legal. As a pure use distinction, by which all but one and two-family houses are barred expressly and by name, it is harder to support. Why may not three families living independently, without common halls, be better housed, in some cases, than two with common halls? If two-family districts can be created, why not districts for three, and four, and five family houses? If not, just where should the distinction be made? The only differentiation, it is submitted, which is clearly based upon grave considerations of public welfare is that between the house that a man shares with others and the house that he, with his wife and children, occupies alone and can make a real home; and it is the validity of the one-family house district most essential to the public welfare, which the courts are most likely to sustain.[44a]

[44a] Since the writing of this chapter, a number of decisions, mentioned in note 34 on page 284 of this work, have been rendered in New Jersey and one in Missouri, holding certain zoning ordinances invalid; and a similar decision is said to have been given in Texas. In this brief note there is not space to discuss these decisions adequately. In New Jersey there are statutes authorizing municipalities to pass zoning regulations, and the cases in that state decided that the ordinances in question, or certain sections of them, were not so drawn as to fulfil the requirements of these statutes. As a rule the faults in these ordinances were more or less obvious, and do not need to be pointed out here. In no instance did the court intimate that zoning was contrary to the New Jersey constitution; indeed, the opinions indicate there that the judges thought it constitutional. One of these cases (Handy v. Village of South Orange,—Atl.—Feb. 21, 1922) held that the statute on which the ordinance under review was based (1920 ch. 240) did not authorize the provision which that ordinance contained creating one-family house districts. It does not follow, of course, that under a proper statute a proper provision creating such a district would not be valid; but in future the advocates of such districts will have this decision to reckon with. The statute has now been amended (1922, ch. 162) to authorize such districts.

In Missouri there is no statute authorizing zoning. The Missouri case (City of St. Louis v. Evraiff and Friedman, Mo. Supreme Court, Oct. Term, 1921), therefore, is a holding that zoning in the absence of such a statute is invalid. The dicta in that case cannot be regarded as shaking the force of the decisions of New York and Massachusetts holding zoning to be constitutional, or the conclusions in the text based upon these decisions.

See also recent adverse decisions said to have been rendered in Illinois and Louisiana.

Note E

No. 1. The Massachusetts Zoning Constitutional Amendment,[45] Art. LX

The General Court[46] shall have power to limit buildings according to their use or construction to specified districts of cities and towns.

No. 2. The New York Zoning Law for New York City[47]

New York City Charter, Sec. 242-a. *Board of estimate: power to regulate height of buildings, and to amend, supplement, change and enforce regulations.* The board of estimate and apportionment shall have power to regulate and limit the height and bulk of buildings hereafter erected and to regulate and determine the area of yards, courts and other open spaces. The board shall divide the city into districts of such number, shape and area as it may deem best suited to carry out the purposes of this section. The regulations as to the height and bulk of buildings and the area of yards, courts and other open spaces shall be uniform for each class of buildings throughout each district. The regulations in one or more districts may differ from those in other districts. Such regulations shall be designed to secure safety from fire and other dangers and to promote the public health and welfare, including, so far as conditions may permit, provisions for adequate light, air, and convenience of access. The board shall pay reasonable regard to the character of buildings erected in each district, the value of the land and the use to which it may be put to the end that such regulations may promote public health, safety and welfare and the most desirable use for which the land of each district may be adapted and may tend to conserve the value of buildings and enhance the value of land throughout the city. The board shall appoint a commission to recommend the boundaries of districts and appropriate regulations to be enforced therein. Such commission shall make a tentative report and hold public hearings thereon at such times and places as said board shall require before submitting its final report. Said board shall not determine the boundaries of any district nor impose any regulation until after the final report of a commission so appointed. After such final report said board shall afford persons interested an opportunity to be heard at a time and place to be specified in a notice of hearing to be published for ten consecutive days in the City Record. The board may from time to time after public notice and hearing amend, supplement or change

[45] Adopted November 5, 1918.
[46] That is, the Legislature of the state.
[47] 1914, ch. 470, as amended by 1916, ch. 497, 503 and 1917, ch. 601.

said regulations or districts but in case a protest against a proposed amendment, supplement or change be presented, duly signed and acknowledged by the owners of twenty per centum or more of the frontage proposed to be altered, or by the owners of twenty per centum of the frontage immediately in the rear thereof, or by the owners of twenty per centum of the frontage directly opposite the frontage proposed to be altered, such amendment shall not be passed except by a unanimous vote of the board. Said regulations shall be enforced by the superintendent of buildings of each borough and the tenement house commissioner, under the rules and regulations of the board of standards and appeals. Said regulations of the board of estimate and apportionment may provide that the board of appeals may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained.

Sec. 242-b. *Board of estimate; powers as to location of industries and buildings and enforcement of regulations.* The board of estimate and apportionment may regulate and restrict the location of trades and industries and the location of buildings designed for specified uses, and may divide the city into districts of such number, shape and area as it may deem best suited to carry out the purposes of this section. For each such district regulations may be imposed designating the trades and industries that shall be excluded or subjected to special regulations and designating the uses for which buildings may not be erected or altered. Such regulations shall be designed to promote the public health, safety and general welfare. The board shall give reasonable consideration, among other things to the character of the district, its peculiar suitability for particular uses, the conservation of property values, and the direction of building development in accord with a well considered plan. The board shall appoint a commission to recommend the boundaries of districts and appropriate regulations and restrictions to be imposed therein. Such commission shall make a tentative report and hold public hearings thereon before submitting its final report at such time as said board shall require. Said board shall not determine the boundaries of any district nor impose any regulations or restrictions until after the final report of a commission so appointed. After such final report said board shall afford persons interested an opportunity to be heard at a time and place to be specified in a notice of hearing to be published for ten consecutive days in the City Record. The board may from time to time after public notice and hearing amend, supplement or change said regulations or districts but in case a protest against a proposed amendment, supplement or change be presented, duly signed and acknowledged by the owners of twenty per centum or more of the frontage proposed to be altered, or, by the owners of twenty per centum of the frontage immediately in the rear thereof, or by the

owners of twenty per centum of the frontage directly opposite the frontage proposed to be altered, such amendment shall not be passed except by a unanimous vote of the board. Said regulations shall be enforced by the superintendent of buildings of each borough, the tenement house commissioner and the fire commissioner under the rules and regulations of the board of standards and appeals. Said regulations of the board of estimate and apportionment may provide that the board of appeals may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specified rules therein contained.

Sec. 718-d. *Board of Appeals.* The appointed members of the board of standards and appeals and the chief of the uniformed force of the fire department, exclusive of the other members, shall hear and decide appeals from and review any rule, regulation, amendment or repeal thereof, order, requirement, decision or determination of a superintendent of buildings made under the authority of title two of chapter nine of this act or of any ordinance or of the fire commissioner under the authority of title three of chapter fifteen of this act or of any ordinance, or of the labor law. They shall also hear and decide all matters referred to them or upon which they are required to pass under any resolution of the board of estimate and apportionment adopted pursuant to sections two hundred and forty-two-a and two hundred and forty-two-b of this chapter. No member of the board shall pass upon any question in which he or any corporation in which he is a stockholder or security holder is interested.

Hearings on appeals shall be before at least five members of the board of appeals, and the concurring vote of five members of the board of appeals shall be necessary to a decision.

The words board of appeals when used in this chapter refer to the said appointed members of the board of standards and appeals and the chief of the uniformed force of the fire department, when acting under the powers conferred by this section.

No. 3. The New York Zoning Law for Cities

This law[48] gives the cities of New York state the same powers to zone that were previously given the city of New York, and in essentially the same language. In 1920[49] the law was amended by adding provisions with regard to appeals as follows:

Sec. 81. *Board of Appeals.* 1. The mayor of any city, except a city of the first class, may appoint a board of appeals consisting of five members, each to be appointed for three years. Such board of appeals shall hear and decide appeals from and review any order,

[48] The law is 1917, ch. 483, and is an amendment to the General City Law. It does not apply to Rochester.

[49] Ch. 743.

requirement, decision or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to paragraphs twenty-four and twenty-five of section twenty of this chapter. They shall also hear and decide all matters referred to them or upon which they are required to pass under any ordinance of the common council adopted pursuant to such two paragraphs. The concurring vote of four members of the board shall be necessary to reverse any order, requirement, decision or determination of any such administrative official, or to decide in favor of the applicant any matter upon which they are required to pass under any such ordinance or to effect any variation in such ordinance. Every decision of such board shall, however, be subject to review by certiorari. Such appeal may be taken by any person aggrieved or by an officer, department, board or bureau of the city.

2. Appeal how taken. Such appeal shall be taken within such time as shall be prescribed by the board of appeals by general rule, by filing with the officer from whom the appeal is taken and with the board of appeals of a notice of appeal, specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

3. Stay. An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of appeals after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of appeals or by the supreme court, on application, on notice to the officer from whom the appeal is taken and on due cause shown.

4. Hearing of and decision upon appeal. The board of appeals shall fix a reasonable time for the hearing of the appeal and give due notice thereof to the parties, and decide the same within reasonable time. Upon the hearing, any party may appear in person or by agent or by attorney. The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and shall make such order, requirement, decision or determination as in its opinion ought to be made in the premises, and to that end shall have all the powers of the officer from whom the appeal is taken. Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance, the board of appeals shall have power of passing upon appeals, to vary or modify any of its rules, regulations or provisions relating to the construction, structural changes in, equipment or alteration of buildings or structures, so that the spirit of the ordi-

nance shall be observed, public safety secured and substantial justice done.

SEC. 82. *Certiorari to review decision of board of appeals.* 1. Petition. Any person or persons, jointly or severally aggrieved by any decision of the board of appeals, or any officer, department, board or bureau of the city, may present to the supreme court a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition must be presented to a justice of the supreme court or at a special term of the supreme court within thirty days after the filing of the decision in the office of the board.

2. Writ of certiorari. Upon presentation of such petition, the justice or court may allow a writ of certiorari directed to the board of appeals to review such decision of the board of appeals and shall prescribe therein the time within which a return thereto must be made and served upon the relator or his attorney, which shall not be less than ten days and may be extended by the court or a justice thereof. Such writ shall be returnable to a special term of the supreme court of the judicial district in which the property affected, or a portion thereof, is situated. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

3. Return to writ. The board of appeals shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by such writ. The return must concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and must be verified.

4. Proceedings upon return. If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

5. Costs. Costs shall not be allowed against the board, unless it shall appear to the court that it acted with gross negligence or in bad faith or with malice in making the decision appealed from.

6. Preferences. All issues in any proceeding under this section shall have preference over all other civil actions and proceedings.

SEC. 83. *Amendments, alterations and changes in district lines.* The common council may from time to time on its own motion or on petition, after public notice and hearing, amend, supplement or change

the regulations and districts established under any ordinance adopted pursuant to paragraphs twenty-four and twenty-five of section twenty of this chapter. Whenever the owners of fifty per centum or more of the frontage in any district or part thereof shall present a petition duly signed and acknowledged to the common council requesting an amendment, supplement, change or repeal of the regulations prescribed for such district or part thereof, it shall be the duty of the council to vote upon said petition within ninety days after the filing of the same by the petitioners with the secretary of the council. If, however, a protest against such amendment, supplement or change be presented, duly signed and acknowledged by the owners of twenty per centum or more of any frontage proposed to be altered, or by the owners of twenty per centum of the frontage immediately in the rear thereof, or by the owners of twenty per centum of the frontage directly opposite the frontage proposed to be altered, such amendment shall not be passed except by the unanimous vote of the council.

SEC. 2. This act shall take effect immediately.

No. 4. THE NEW JERSEY ZONING LAW FOR CITIES[80]

An Act to enable cities to regulate and limit the height and bulk of buildings, to regulate and determine the area of yards, courts and other open spaces, and to regulate and restrict the location of buildings for trades and industries.

Be it enacted, etc.

Building regulations

1. The common council or governing commission of cities shall have power to regulate and limit the height and bulk of buildings hereafter erected and to regulate and determine the area of yards, courts and other open spaces. The common council or governing commission may divide the city into districts of such number, shape and area as it may deem best suited to carry out the purposes of this section. The regulations as to the height and bulk of buildings and the area of yards, courts and other open spaces shall be uniform for each class of buildings throughout each district. The regulations in one or more districts may differ from those in other districts. Such regulations shall be designed to secure safety from fire and other dangers and to promote the public health and welfare, including provision for adequate light, air, and convenience of access. The common council or governing commission shall pay reasonable regard to the character of buildings erected in each district, the value of the land and the use to which it may be put to the end that such regulations may promote public health, safety and welfare and the most desirable use for which the land of each district may be adapted and may tend to conserve the values of the buildings and enhance the value of land throughout the city.

City districted.

Regulations.

Design of regulations.

Considerations.

[80] 1920, ch. 229.

Location of trades and industries.

2. The common council or governing commission of cities shall also have the power to regulate and restrict the location of buildings designed for specified uses, as well as the location of trades and industries, and may divide the city into districts of such number, shape and area as it may deem best suited to carry out the purposes of this section. For each such district regulations may be imposed designating the use for which buildings may not be erected or altered, and designating the trades and industries that shall be excluded or subjected to special regulations. Such regulations shall be designed to promote the public health, safety and general welfare. The common council or governing commission shall give reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values, and the direction of building development in accord with a well-considered plan; *provided, however,* no such regulation or restriction shall become effective in any city until after a public hearing, notice of which has been published for not less than two weeks in one or more newspapers of general circulation printed and published in such city, and if there is no newspaper printed and published in such city then in one or more newspapers having a general circulation in such city.

Uses.

Suitability.

Proviso.

Commission.

3. The common council or governing commission of cities accepting the provisions of this act shall appoint a commission to be known as "Commission on Building Districts and Restrictions," to consist of three members for a term of four years. The members of such commission on building districts and restrictions shall consist of three members of whom one shall be appointed chairman. Such members shall be paid an annual salary of twenty-five hundred dollars per year, except that the chairman shall be paid three thousand dollars per year.

Membership.

Salary.

May change regulations.

4. The common council or governing commission may from time to time, after public notice and hearing, amend, supplement or change said regulations or districts. Such proposed amendment, supplement or change, however, must first be referred to the commission on building districts and restrictions for consideration and report before final action shall be taken thereon by said common council or governing commission. But in case a protest against a proposed amendment, supplement or change be presented, duly signed and acknowledged by the owners of twenty per centum or more of the frontage of the property proposed to be altered, or by the owners of twenty per centum of the frontage upon the street immediately in the rear thereof, or by the owners of twenty per centum of the frontage directly opposite the property proposed to be altered, such amendment shall not be passed except by a three-quarters vote of the common council or governing commission.

As to streets and paving.

5. Such commission on building districts and restrictions shall investigate and examine into the opening, grading, widening, light-

ing and paving of streets and sidewalks and shall make recommendations to the governing body from time to time of any such improvements as in their opinion will advance the welfare of such city or the inhabitants thereof.

May waive restrictions.

6. Such commission on building districts and restrictions and the governing body shall have power and authority in exceptional cases in their discretion to waive any of the regulations or restrictions theretofore adopted or imposed, but only after a public hearing and upon the unanimous vote of all the members thereof.

Secretary and assistants.

7. Such commission on building districts and restrictions is authorized to employ a secretary and such clerical and other assistants as may be agreed upon by the members of such commission and such governing body is hereby authorized to appropriate and raise such sum or sums of money as may be necessary for the support of such commission as other appropriations are made and raised.

City plan not affected.

8. This act shall not be construed so as to limit or abridge any right, power or authority conferred or vested in city plan commissions in cities of this State.

Local ordinances to govern.

9. Wherever the provisions of any ordinance or regulation adopted by the common council or governing commission under the provisions of this act impose requirements for lower height of buildings or a less percentage of lot that may be occupied, or require wider or larger courts or deeper yards than are imposed or required by existing provision of law or ordinance, the provision of such local ordinance or regulation adopted under the provision of this act shall govern. Where, however, the provisions of the New Jersey tenement house law, the building code or other ordinance or regulation of any city impose requirements for lower height of building, or less percentage of lot that may be occupied, or require wider or larger courts or deeper yards than are required by any ordinance or regulation which may be adopted by the common council or governing commission under the provision of this act, the provision of said New Jersey tenement house law or said building code or other ordinance or regulation shall govern.

When building code to govern.

Acts inoperative.

10. All acts and parts of acts inconsistent with the provisions of this act and more especially an act entitled "An act to enable cities of the first and second class to regulate and limit the height and bulk of buildings, to regulate and determine the area of yards, courts and other open spaces, and to regulate and restrict the location of trades and industries," approved February twenty-seventh, one thousand nine hundred and eighteen, are hereby declared inoperative in any city where the provisions of this act shall have been adopted as hereinafter provided; *provided, however,* that if any provisions of this act shall be declared invalid, it shall not affect the remainder of this act, but the same shall continue in full force and effect.

Proviso.

11. This act shall take effect immediately, but its provisions shall remain inoperative in any city of this State until adopted by a majority vote of the legal voters thereof at an election under the same conditions as provided in sections six and seven of an act entitled "An act relative to the division of the uniform fire-fighting force, of cities of the first class in this State, into two platoons," approved February eighteenth, one thousand nine hundred and sixteen. Referendum.

No. 5. The District of Columbia Zoning Law[51]

An Act to regulate the height, area, and use of buildings in the District of Columbia and to create a Zoning Commission, and for other purposes.

"*Be it enacted,* etc.

"That to protect the public health, secure the public safety, and to protect property in the District of Columbia there is hereby created a Zoning Commission, which shall consist of the Commissioners of the District of Columbia, the officer in charge of public buildings and grounds of the District of Columbia, and the Superintendent of the United States Capitol Building and Grounds, which said commission shall have all the powers and perform all the duties hereinafter specified and shall serve without additional compensation. Such employees of the government of the District of Columbia as may be necessary to carry out the purposes of this Act shall be assigned to such duty by the Commissioners of the District of Columbia without additional compensation. There is hereby authorized for the expenses of said Commission, including the employment of expert services and all incidental and contingent expenses, a sum not to exceed $5,000, payable one-half out of any money in the United States Treasury not otherwise appropriated and the other half out of the revenues of the District of Columbia. District of Columbia Zoning Commission created. Membership. Assignment of employees. Authorization for expenses. Half from District revenues.

"Sec. 2. That within six months after the passage of this Act and after public notice and hearing as hereinafter provided, the said commission shall divide the District of Columbia into certain districts, to be known, respectively, as height, area, and use districts, and shall adopt regulations specifying the height and area of buildings thereafter to be erected or altered therein and the purposes for which buildings and premises therein may be used: *Provided,* That such regulations may differ in the various districts: *Provided further,* That the permissible height of buildings in any district shall not exceed the maximum height of building now authorized upon any street in any part of that district by the Act of Congress approved June 1, 1910, Height, area and use districts to be established. Building regulations for. *Provisos.* Variations. Maximum heights.

[51] U. S. Public Act No. 153, 66th Congress, approved March 1, 1920 (41 U. S. Stat. at Large, 500).

and amendments thereto, regulating the height of buildings in the District of Columbia: *And provided further,* That no such districts shall be established, nor shall any regulations therefor be adopted, nor shall the height, area, or use of buildings to be erected therein be prescribed until said commission has afforded persons interested an opportunity to be heard at a public hearing as hereinafter provided: *and provided further,* That in residence districts the usual accessories of a residence located on the same lot, including the office of a physician, dentist, or other person, and including a private garage containing space for not more than five automobiles, shall not be prohibited."

Public hearings before establishing districts, etc.

Accessories permitted in residence districts.

"SEC. 3. That wherever, under the provision of this Act, it is required that a public hearing shall be held, notice of the time and place of such hearing shall be published for not less than ten consecutive days in one or more newspapers of general circulation printed and published in the District of Columbia; and such public hearing may be adjourned from time to time: *Provided,* That if the time and place of the adjourned meeting is publicly announced when the adjournment is had, no further notice of such adjourned meeting need be published."

Advertisement of hearings.

Proviso. Adjourned meetings.

"SEC. 4. That after the public hearings herein provided for shall have been concluded, said commission shall definitely determine the number and boundaries of the districts which it is hereby authorized and directed to establish, and shall specify the height and area of the buildings which may thereafter be erected therein, and shall prescribe the purposes for which such buildings thereafter erected may or may not be used. Said districts so established shall not be changed except on order of said commission after public hearing. Said commission may initiate such changes, or they may be initiated upon the petition of the owners affected. Where the proposed change is to add a contiguous area to a use, height, or area district, the owners of at least 50 per centum of the street frontage proposed to be changed must join in the petition: *Provided,* That if the frontage proposed to be changed is not a contiguous area, the owners of at least 50 per centum of a frontage within the area not less than three blocks in length must join in such petition before it may be considered by said commission. No such change shall be made, either by said commission on its own motion or upon such petition, except with the unanimous vote of said commission, if the owners of at least 20 per centum of the frontage proposed to be changed protest against such change."

Establishment of districts.

Height, etc., of buildings in, to be specified.

Changes restricted.

Proviso. Petition of owners required.

Action on changes.

"SEC. 5. That said commission is authorized and empowered to make such orders and adopt such regulations not inconsistent with law as may be necessary to accomplish the purposes and carry into effect the provisions of this Act: *Provided,* That no order or regulation so adopted shall require any change in the plans, construction, or designated use of (a) a building for which a permit shall have

Orders and regulations authorized.

Provisos. Construction allowed if permit

been issued, or plans for which shall be on file with the inspector of buildings of the District of Columbia at the time the orders or regulations authorized under this Act are promulgated; or (b) a permit for the erection of which shall be issued within thirty days after promulgation of the orders or regulations authorized or adopted under this Act and the construction of which in either of the above cases shall have been diligently prosecuted within a year from the date of such permit and the ground story framework of which, including the second tier of beams, shall have been completed within said year, and which entire building shall be completed according to such plans within two years of the date of the promulgation of such orders or regulations; or (c) prevent the restoration of a building partially destroyed by fire, explosion, act of God or the public enemy, or prevent the continuance of the use of such building or part thereof as such use existed at the time of such partial destruction, or prevent a change of such existing use except under the limitations provided herein in relation to existing buildings and premises: *Provided further,* That no frame building that has been damaged by fire or otherwise more than one-half of its original value shall be restored within the fire limits as provided by the building regulations of the District of Columbia; or (d) prevent the restoration of a wall declared unsafe by the inspector of buildings of the District or by a board of survey appointed in accordance with any existing law or regulation."

issued when orders promulgated.

Within thirty days after promulgation, etc.

Conditions.

Restoration of buildings partially destroyed by fire, etc.

Restriction as to frame buildings.

Restoration of unsafe walls.

"SEC. 6. That any lawful use of a building or premises existing at the time of the adoption of orders and regulations made under the authority of this Act may be continued, although such use does not conform with the provisions hereof or with the provisions of such orders and regulations; and such use may be extended throughout the building, provided no structural alteration, except those required by law or regulation, is made therein and no new building is erected. Where the boundary line of any use district divides a lot in a single ownership at the time of the adoption of orders and regulations under the authority of this Act, the commission may permit a use authorized on either portion of such lot to extend to the entire lot, but not more than twenty-five feet beyond the boundary line of the use district."

Existing use of building may be continued.

Conditions.

Lots located in adjoining use districts.

"SEC. 7. That maps of the districts established by said commission and copies of all orders and regulations as to the height and area of buildings to be erected therein and as to the uses to which such buildings may be lawfully devoted, and copies of all other official orders and regulations of the commission shall be filed in the office of the Engineer Commissioner of the District of Columbia. Copies of all orders and regulations shall be published in one or more newspapers printed in the District of Columbia for the information of all concerned."

Maps, orders, etc., of commission to be filed.

Publication of orders, etc.

Certificate of occupancy required for use of buildings, etc.

"SEC. 8. That it shall be unlawful to use or permit the use of any building or premises or part thereof hereafter created, erected, changed, or converted wholly or partly in its use or structure until a certificate of occupancy shall have been issued by authority of said zoning commission."

Buildings violating orders, etc., declared nuisances.

"SEC. 9. That buildings erected, altered, or raised, or converted in violation of any of the provisions of this Act or the orders and regulations made under the authority thereof are hereby declared to be common nuisances; and the owner or person in charge of or maintaining any such buildings, upon conviction on information filed in the police court of the District of Columbia by the corporation counsel or any of his assistants in the name of said District, and which court is hereby authorized to hear and determine such cases, shall be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not more than $100 per day for each and every day such nuisance shall be permitted to continue, and shall be required by said court to abate such nuisance. The corporation counsel of the District of Columbia may maintain an action in the Supreme Court of the District of Columbia in the name of the District of Columbia to abate and perpetually enjoin such nuisance.

Penalty for maintaining.

Injunction proceedings.

Enforcement by District Commissioners.

"SEC. 10. That the Commissioners of the District of Columbia shall enforce the provisions of this Act and the orders and regulations adopted by said Zoning Commission under the authority thereof, and nothing herein contained shall be construed to limit the authority of the Commissioners of the District of Columbia to make municipal regulations as heretofore: *Provided,* That such regulations are not inconsistent with the provisions of this law and the orders and regulations made thereunder. In interpreting and applying the provisions of this Act and of the orders and regulations made thereunder they shall be held to be the minimum requirements for the promotion of the public health, safety, comfort, convenience, and general welfare. This Act shall not abrogate or annul any easements, covenants, or other agreements between parties: *Provided, however,* That as to all future building construction or use of premises where this Act or any orders or regulations adopted under the authority thereof impose a greater restriction upon the use of buildings or premises or upon height of building, or require larger open spaces than are imposed or required by existing law, regulations, or permits, or by such easements, covenants, or agreements, the provisions of this Act and of the orders and regulations made thereunder shall control."

Provisos. Conditions.

Future construction, etc., subject to restrictions under this Act.

Inconsistent laws repealed.

"SEC. 11. That all laws or parts of laws and regulations in conflict with the provisions of this Act are hereby repealed."

No. 6. The New York City Building Zone Resolution [52]

A Resolution regulating and limiting the height and bulk of buildings hereafter erected and regulating and determining the area of yards, courts and other open spaces, and regulating and restricting the location of trades and industries and the location of buildings designed for specified uses and establishing the boundaries of districts for the said purposes.

Be it resolved by the Board of Estimate and Apportionment of The City of New York:

ARTICLE I—DEFINITIONS

Sec. 1. *Definitions.* Certain words in this resolution are defined for the purposes thereof as follows:

(*a*) Words used in the present tense include the future; the singular number includes the plural and the plural the singular; the word "lot" includes the word "plot"; the word "building" includes the word "structure."

(*b*) The "street line" is the dividing line between the street and the lot.

(*c*) The "width of the street" is the mean of the distances between the sides thereof within a block. Where a street borders a public place, public park or navigable body of water the width of the street is the mean width of such street plus the width, measured at right angles to the street line, of such public place, public park or body of water.

(*d*) The "curb level," for the purpose of measuring the height of any portion of a building, is the mean level of the curb in front of such portion of the building. But where a building is on a corner lot the curb level is the mean level of the curb on the street of greatest width. If such greatest width occurs on more than one street the curb level is the mean level of the curb on that street of greatest width which has the highest curb elevation. The "curb level" for the purpose of regulating and determining the area of yards, courts and open spaces is the mean level of the curb at that front of the building where there is the highest curb elevation. Where no curb elevation has been established or the building does not adjoin the street the average ground level of the lot shall be considered the curb level.

(*e*) A "street wall" of a building, at any level, is the wall or part of the building nearest to the street line.

(*f*) The "height of a building" is the vertical distance measured in the case of flat roofs from the curb level to the level of the highest point of the roof beams adjacent to the street wall, and in the case of

[52] Adopted July 25, 1916.

pitched roofs from the curb level to the mean height level of the gable. Where no roof beams exist or there are structures wholly or partly above the roof the height shall be measured from the curb level to the level of the highest point of the building. Where a building is a tenement house as defined in the Tenement House Law the height of the building on the street line shall be measured as prescribed in said law for the measurement of the height of a tenement house and such measurement shall be from the curb level as that term is used in said law.

(*g*) The "depth of a lot" is the mean distance from the street line of the lot to its rear line measured in the general direction of the side lines of the lot.

(*h*) A "rear yard" is an open unoccupied space on the same lot with a building between the rear line of the building and the rear line of the lot.

(*i*) The "depth of a rear yard" is the mean distance between the rear line of the building and the rear line of the lot.

(*j*) Lots or portions of lots shall be deemed "back to back" when they are on opposite sides of the same part of a rear line common to both and the opposite street lines on which the lots front are parallel with each other or make an angle with each other of not over 45 degrees.

(*k*) A "court" is an open unoccupied space, other than a rear yard, on the same lot with a building. A court not extending to the street or to a rear yard is an "inner court." A court extending to the street or a rear yard is an "outer court." A court on the lot line extending through from the street to a rear yard or another street is a "side yard."

(*l*) The "height of a yard or a court" at any given level shall be measured from the lowest level of such yard or court as actually constructed or from the curb level, if higher, to such level. The highest level of any given wall bounding a court or yard shall be deemed to be the mean height of such wall. Where a building is a tenement house, as defined in the Tenement House Law, the height of a yard or a court shall be measured as prescribed in such law.

(*m*) The "least dimension" of a yard or court at any level is the least of the horizontal dimensions of such yard or court at such level. If two opposite sides of a yard or court are not parallel the horizontal dimension between them shall be deemed to be the mean distance between them.

(*n*) The "length of an outer court" at any given point shall be measured in the general direction of the side lines of such court from the end opposite the end opening on a street, or a rear yard, to such point.

ARTICLE II—USE DISTRICTS

SEC. 2. *Use Districts.* For the purpose of regulating and restricting the location of trades and industries and the location of buildings designed for specified uses, the City of New York is hereby divided into three classes of districts: (1) residence districts, (2) business districts, and (3) unrestricted districts; as shown on the use district map which accompanies this resolution and is hereby declared to be part hereof. The use districts designated on said map are hereby established. The use district map designations and map designation rules which accompany said use district map are hereby declared to be part thereof. No building or premises shall be erected or used for any purpose other than a purpose permitted in the use district in which such building or premises is located.

SEC. 3. *Residence Districts.* In a residence district no building shall be erected other than a building, with its usual accessories, arranged, intended or designed exclusively for one or more of the following specified uses:

(1) Dwellings, which shall include dwellings for one or more families and boarding houses and also hotels which have thirty or more sleeping rooms.

(2) Clubs, excepting clubs the chief activity of which is a service customarily carried on as a business.

(3) Churches.

(4) Schools, libraries or public museums.

(5) Philanthropic or eleemosynary uses or institutions, other than correctional institutions.

(6) Hospitals and sanitariums.

(7) Railroad passenger stations.

(8) Farming, truck gardening, nurseries or green houses.

In a residence district no building or premises shall be used for any use other than a use above specified for which buildings may be erected and for the accessory uses customarily incident thereto. The term accessory use shall not include a business nor shall it include any building or use not located on the same lot with the building or use to which it is accessory. A private garage for more than five motor vehicles shall not be deemed an accessory use.

SEC. 4. *Business Districts.* (*a*) In a business district no building or premises shall be used, and no building shall be erected which is arranged, intended or designed to be used, for any of the following specified trades, industries or uses:[53]

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[53] The list is here given as amended December 21, 1917. As a further aid to the zoner endeavoring to prepare a similar list suitable for use in any given locality, the following additional industries, selected from

(1) Ammonia, chlorine or bleaching powder manufacture.
(2) Asphalt manufacture or refining.
(3) Assaying (other than gold or silver).
(4) Blacksmithing or horseshoeing.
(5) Boiler making.
(6) Brewing or distilling of liquors.
(7) Carpet cleaning.
(8) Celluloid manufacture.
(9) Crematory.
(10) Distillation of coal, wood or bones.
(11) Dyeing or dry cleaning.
(12) Electric central station power plant.
(13) Fat rendering.
(14) Fertilizer manufacture.
(15) Garage for more than five motor vehicles, not including a warehouse where motor vehicles are received for dead storage only, and not including a salesroom where motor vehicles are kept for sale or for demonstration purposes only.
(16) Gas (illuminating or heating) manufacture or storage.

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a list prepared after an examination of the various zoning ordinances in this country, by J. P. Fox, Esq., of New York City, are here given:

Acetylene gas manufacturing.
Blast furnace.
Brick, concrete products, terra cotta or tile manufacturing.
Candle manufacturing.
Coke manufacturing.
Creosote manufacturing or treatment.
Disinfectant, insecticide or poison manufacturing.
Dyestuff manufacturing.
Emery cloth and sandpaper manufacturing.
Explosives, fireworks or gunpowder manufacturing.
Forging.
Gasoline or naphtha refining.
Match manufacturing.
Oiled, rubber or leather goods manufacturing.
Ore reduction.
Paper and pulp manufacturing.
Pickle, sauerkraut, sausage or vinegar manufacturing.
Potash refining.
Pyroxylin manufacturing.
Railroad yard or roundhouse.
Rolling mill.
Salt manufacturing.
Shoe blacking manufacturing.
Soda and soda compounds manufacturing.
Stove polish manufacturing.
Tobacco manufacturing or treatment for chewing purposes.
Yeast manufacturing.

(17) Glue, size and gelatine manufacture.
(18) Incineration or reduction of garbage, offal, dead animals or refuse.
(19) Iron, steel, brass or copper works.
(20) Junk, scrap paper or rag storage or baling.
(21) Lamp black manufacture.
(22) Lime, cement or plaster of Paris manufacture.
(23) Milk bottling and distributing station.
(24) Oil cloth or linoleum manufacture.
(25) Paint, oil, varnish or turpentine manufacture.
(26) Petroleum refining or storage.
(27) Printing ink manufacture.
(28) Raw hides or skins—storage, curing or tanning.
(29) Repair shop for motor vehicles.
(30) Rubber manufacture from the crude material.
(31) Saw or planing mill.
(32) Shoddy manufacture or wool scouring.
(33) Slaughtering of animals.
(34) Smelting.
(35) Soap manufacture.
(36) Stable for more than five horses.
(37) Starch, glucose or dextrine manufacture.
(38) Stock yards.
(39) Stone or monumental works.
(40) Sugar refining.
(41) Sulphurous, sulphuric, nitric or hydrochloric acid manufacture.
(42) Tallow, grease or lard manufacturing or refining.
(43) Tar distillation or manufacture.
(44) Tar roofing or tar waterproofing manufacture.

(*b*) In a business district no building or premises shall be used, and no building shall be erected, which is arranged, intended or designed to be used for any trade, industry or use that is noxious or offensive by reason of the emission of odor, dust, smoke, gas or noise; but car barns or places of amusement shall not be excluded.

(*c*) In a business district no building or premises shall be used, and no building shall be erected, which is arranged, intended or designed to be used, for any kind of manufacturing, except that any kind of manufacturing not included within the prohibitions of paragraphs *a* and *b* of this section may be carried on provided not more than 25 per cent. of the total floor space of the building is so used, but space equal to the area of the lot may be so used in any case, although in excess of said 25 per cent. The printing of a newspaper shall not be deemed manufacturing. No use permitted in a residence district by section 3 shall be excluded from a business district.

SEC. 5. *Unrestricted Districts.* The term "unrestricted district" is used to designate the districts for which no regulations or restrictions are provided by this article.

SEC. 6. *Existing Buildings and Premises.* (*a*) Any use existing in any building or premises at the time of the passage of this resolution and not conforming to the regulations of the use district in which it is maintained, may be continued therein. No existing building designed, arranged, intended or devoted to a use not permitted by this article in the district in which such use is located shall be enlarged, extended, reconstructed or structurally altered unless such use is changed to a use permitted in the district in which such building is located. Such building may, however, be reconstructed or structurally altered to an extent not greater than 50 per cent. of the value of the building, exclusive of foundations, provided that no use in such building is changed or extended, except as authorized in paragraph *b* of this section, and provided, further, that no use included in any one of the enumerated subdivisions of paragraph *a* of section 4 is changed into a use included in any other enumerated subdivision of paragraph *a* of section 4 or into a use prohibited by paragraph *b* of section 4, and also provided that no use prohibited by paragraph *b* of section 4 is changed into another use prohibited by paragraph *b* of section 4 or into a use included in an enumerated subdivision of paragraph *a* of section 4.

(*b*) Any use existing in any building or premises at the time of the passage of this resolution and not conforming to the regulations of the use district in which it is maintained may be changed, and such use may be extended throughout the building, provided that in either case:

(1) No structural alterations shall be made in the building, except as authorized by paragraph *a* of this section, and

(2) In a residence district no portion of a building devoted to a use included in subdivision 1 of section 3 shall be changed to any use prohibited in a residence district, and

(3) In a residence district no building or premises, unless devoted to one of the uses that is by section 4 prohibited in a business district, shall be changed to any of such uses, and

(4) In a residence or business district no building or part thereof and no premises unless devoted to one of the uses that is by paragraphs *a* or *b* of section 4 prohibited in a business district, shall be changed to any of such uses.

If a use is changed as authorized in this section, the new use may thereafter be changed, subject to the limitations imposed by subdivisions 1, 2, 3 and 4 of this paragraph.[54]

SEC. 7. *Use District Exceptions.* The Board of Appeals, cre-

[54] Sec. 6, amended as above December 21, 1917.

ated by chapter 503 of the laws of 1916, may, in appropriate cases, after public notice and hearing, and subject to appropriate conditions and safeguards, determine and vary the application of the use district regulations herein established in harmony with their general purpose and intent as follows:

(*a*) Permit the extension of an existing building and the existing use thereof upon the lot occupied by such building at the time of the passage of this resolution or permit the erection of an additional building upon a lot occupied at the time of the passage of this resolution by a commercial or industrial establishment and which additional building is a part of such establishment;

(*b*) Where a use district boundary line divides a lot in a single ownership at the time of the passage of this resolution, permit a use authorized on either portion of such lot to extend to the entire lot, but not more than 25 feet beyond the boundary line of the district in which such use is authorized;

(*c*) Permit the extension of an existing or proposed building into a more restricted district under such conditions as will safeguard the character of the more restricted district;[55]

(*d*) Permit in a residence district a central telephone exchange or any building or use in keeping with the uses expressly enumerated in section 3 as the purposes for which buildings or premises may be erected or used in a residence district;

(*e*) Permit in a business district the erection or extension of a garage or stable in any portion of a street between two intersecting streets in which portion there exists a garage for more than five motor vehicles or a stable for more than five horses at the time of the passage of this resolution;[56]

(*f*) Grant in undeveloped sections of the city temporary and conditional permits for not more than two years for structures and uses in contravention of the requirements of this article.

(*g*) Permit in a business or residence district the erection of a garage provided the petitioner files the consents duly acknowledged of the owners of 80 per cent. of the frontage deemed by the Board to be immediately affected by the proposed garage. Such permit shall specify the maximum size or capacity of the garage and shall impose appropriate conditions and safeguards upon the construction and use of the garage.[57]

ARTICLE III—HEIGHT DISTRICTS

SEC. 8. *Height Districts.* For the purpose of regulating and limiting the height and bulk of buildings hereafter erected, the City

[55] Par. *c* of sec. 7, amended as above, March 23, 1917.
[56] Par. *e* of sec. 7, amended as above, December 21, 1917.
[57] Par. *g* of sec. 7, amended as above, September 21, 1917.

of New York is hereby divided into six classes of districts: (*a*) three-quarter times districts, (*b*) one times districts, (*c*) one and one-quarter times districts, (*d*) one and one-half times districts, (*e*) two times districts, (*f*) two and one-half times districts; as shown on the height district map which accompanies this resolution and is hereby declared to be part hereof. The height districts designated on said map are hereby established. The height district map designations and map designation rules which accompany said height district map are hereby declared to be part thereof. No building or part of a building shall be erected except in conformity with the regulations herein prescribed for the height district in which such building is located.

(*a*) In a three-quarter times district no building shall be erected to a height in excess of three-quarter times the width of the street, but for each one foot that the building or a portion of it sets back from the street line one foot shall be added to the height limit of such building or such portion thereof.

(*b*) In a one times district no building shall be erected to a height in excess of the width of the street, but for each one foot that the building or a portion of it sets back from the street line two feet shall be added to the height limit of such building or such portion thereof.

(*c*) In a one and one-quarter times district no building shall be erected to a height in excess of one and one-quarter times the width of the street, but for each one foot that the building or a portion of it sets back from the street line two and one-half feet shall be added to the height limit of such building or such portion thereof.

(*d*) In a one and one-half times district no building shall be erected to a height in excess of one and one-half times the width of the street, but for each one foot that the building or a portion of it sets back from the street line three feet shall be added to the height limit of such building or such portion thereof.

(*e*) In a two times district no building shall be erected to a height in excess of twice the width of the street, but for each one foot that the building or a portion of it sets back from the street line four feet shall be added to the height limit of such building or such portion thereof.

(*f*) In a two and one-half times district no building shall be erected to a height in excess of two and one-half times the width of the street, but for each one foot that the building or a portion of it sets back from the street line five feet shall be added to the height limit of such building or such portion thereof.[57a]

Sec. 9. *Height District Exceptions.* (*a*) On streets less than 50 feet in width the same height regulations shall be applied as on

[57a] Section 8 amended as above November 25, 1921.

streets 50 feet in width and, except for the purposes of paragraph *d* of this section, on streets more than 100 feet in width the same height regulations shall be applied as on streets 100 feet in width.

(*b*) Along a narrower street near its intersection with a wider street, any building or any part of any building fronting on the narrower street within 100 feet, measured at right angles to the side of the wider street, shall be governed by the height regulations provided for the wider street. A corner building on such intersecting streets shall be governed by the height regulations provided for the wider street for 150 feet from the side of such wider street, measured along such narrower street.

(*c*) Above the height limit at any level for any part of a building a dormer, elevator bulkhead or other structure may be erected provided its frontage length on any given street be not greater than 60 per cent. of the length of such street frontage of such part of the building. Such frontage length of such structure at any given level shall be decreased by an amount equal to one per cent. of such street frontage of such part of the building for every foot such level is above such height limit. If there are more than one such structures, their aggregate frontage shall not exceed the frontage length above permitted at any given level.

(*d*) If the area of the building is reduced so that above a given level it covers in the aggregate not more than 25 per cent. of the area of the lot, the building above such level shall be excepted from the foregoing provisions of this article. Such portion of the building may be erected to any height, provided that the distance which it sets back from the street line on each street on which it faces, plus half of the width of the street, equals at least 75 feet. But for each one per cent. of the width of the lot on the street line that such street wall is less in length than such width of the lot, such wall may be erected four inches nearer to the street line.

(*e*) When at the time plans are filed for the erection of a building there are buildings in excess of the height limits herein provided within 50 feet of either end of the street frontage of the proposed building or directly opposite such building across the street, the height to which the street wall of the proposed building may rise shall be increased by an amount not greater than the average excess height of the walls on the street line within 50 feet of either end of the street frontage of the proposed building and at right angles to the street frontage of the proposed building on the opposite side of the street. The average amount of such excess height shall be computed by adding together the excess heights above the prescribed height limit for the street frontage in question of all of the walls on the street line of the buildings and parts of buildings within the above defined frontage and dividing the sum by the total number of buildings and vacant plots within such frontage.

(*f*) Nothing in this article shall prevent the projection of a cornice beyond the street wall to an extent not exceeding five per cent. of the width of the street nor more than five feet in any case. Nothing in this article shall prevent the erection above the height limit of a parapet wall or cornice solely for ornament and without windows extending above such height limit not more than five per cent. of such height limit, but such parapet wall or cornice may in any case be at least five and one-half feet high above such height limit.

(*g*) The provisions of this article shall not apply to the erection of church spires, belfries, chimneys, flues or gas holders.

(*h*) Where not more than 50 feet of a street frontage would otherwise be subjected to a height limit lower than that allowed immediately beyond both ends of such frontage, the height limit on such frontage shall be equal to the lesser of such greater height limits.

(*i*) If an additional story or stories are added to a building existing at the time of the passage of this resolution, the existing walls of which are in excess of the height limits prescribed in this article, the height limits for such additional story or stories shall be computed from the top of the existing walls as though the latter were not in excess of the prescribed height limits and the carrying up of existing elevator and stair enclosures shall be exempted from the provisions of this article.

ARTICLE IV—AREA DISTRICTS

SEC. 10. *Area Districts.* For the purpose of regulating and determining the area of yards, courts and other open spaces for buildings hereafter erected, the City of New York is hereby divided into five classes of area districts: A, B, C, D and E; as shown on the area district map which accompanies this resolution and is hereby declared to be part hereof. The area districts designated on said map are hereby established. The area district map designations and map designation rules which accompany said area district map are hereby declared to be a part thereof. No building or part of a building shall be erected except in conformity with the regulations herein prescribed for the area district in which such building is located. Unless otherwise expressly provided the term rear yard, side yard, outer court or inner court when used in this article shall be deemed to refer only to a rear yard, side yard, outer court or inner court required by this article. No lot area shall be so reduced or diminished that the yards, courts or open spaces shall be smaller than prescribed in this article.

SEC. 11. *A Districts.* In an A district a court at any given height shall be at least one inch in least dimension for each one foot of such height.

SEC. 12. *B Districts.* In a B district a rear yard at any given

height shall be at least two inches in least dimension for each one foot of such height. The depth of a rear yard at its lowest level shall be at least 10 per cent. of the depth of the lot, but need not exceed 10 feet at such level. An outer court or a side yard at any given height shall be at least one inch in least dimension for each one foot of such height. An outer court at any given point shall be at least one and one-half inches in least dimension for each one foot of length. But for each one foot that an outer court at any given height would, under the above rules, be wider in its least dimension for such height than the minimum required by its length, one inch shall be deducted from the required least dimension for such height for each 24 feet of such height. A side yard for its length within 50 feet of the street may for the purposes of the above rule be considered an outer court.

Sec. 13. *C Districts.* (*a*) In a C district a rear yard at any given height shall be at least three inches in least dimension for each one foot of such height. The depth of a rear yard at its lowest level shall be at least 10 per cent. of the depth of the lot but need not exceed 10 feet at such level. An outer court or a side yard at any given height shall be at least one and one-half inches in least dimension for each one foot of such height. An outer court at any given point shall be at least one and one-half inches in least dimension for each one foot of length. On a lot not more than 30 feet in mean width an outer court or a side yard at any given height shall be not less than one inch in least dimension for each one foot of such height, and an inner court at any given height shall be either (1) not less than two inches in least dimension for each one foot of such height or (2) it shall be of an equivalent area as hereinafter specified in paragraph *c* of section 17.

(*b*) If the owner or owners of any part of a C district set aside perpetually for the joint recreational use of the residents of such part designated by them, an area at least equal to 10 per cent. of the area of such part in addition to all yard and court requirements for a B district, such part shall be subject to the regulations herein prescribed for a B district. Such joint recreational space shall be composed of one or more tracts, each of which shall be at least 40 feet in least dimension and 5,000 square feet in area and shall be approved by the Board of Appeals as suitable for the joint recreational use of such residents.

Sec. 14. *D Districts.* (*a*) In a D district a rear yard at any given height shall be at least four inches in least dimension for each one foot of such height. The depth of a rear yard at its lowest level shall be at least 10 per cent. of the depth of the lot, but need not exceed 10 feet at such level. If a building in a D district is located in a residence district as designated on the use district map, the depth of a rear yard at its lowest level shall be at least 20 per cent. of the

depth of the lot, but need not exceed 20 feet at such level. However, for each one foot in excess of 10 feet of the depth of such rear yard at its lowest level, there may be substituted one foot of depth of unoccupied space across the whole width of the front of the lot at the curb level, between the street line and the street wall of the building.

(*b*) In a D district an outer court or a side yard at any given height shall be at least two inches in least dimension for each one foot of such height. An outer court at any given point shall be at least two inches in least dimension for each one foot of length. On a lot not more than 30 feet in mean width an outer court or a side yard at any given height shall be not less than one and one-half inches in least dimension for each one foot of such height. On such lot an outer court at any given point shall be not less than one and one-half inches in least dimension for each one foot of length. On such lot an inner court at any given height shall be either (1) not less than three inches in least dimension for each one foot of such height or (2) it shall be of an equivalent area as specified in paragraph *c* of section 17.

(*c*) In a D district no building located within a residence district as designated on the use district map shall occupy at the curb level more than 60 per cent. of the area of the lot, if an interior lot, or 80 per cent. if a corner lot. In computing such percentage any part of the area of any corner lot in excess of 8,000 square feet shall be considered an interior lot.

(*d*) If the owner or owners of any part of a D district set aside perpetually for the joint recreational use of the residents of such part designated by them, an area at least equal to 10 per cent. of the area of such part in addition to all yard and court requirements for a C district, such part shall be subject to the regulations herein prescribed for a C district. Such joint recreational space shall be composed of one or more tracts, each of which shall be at least 40 feet in least dimension and 5,000 square feet in area and shall be approved by the Board of Appeals as suitable for the joint recreational use of such residents.

Sec. 15. *E Districts.* (*a*) In an E district a rear yard at any given height shall be at least five inches in least dimension for each one foot of such height. The depth of a rear yard at its lowest level shall be at least 15 per cent. of the depth of the lot, but need not exceed 15 feet at such level. If a building in an E district is located in a residence district as designated on the use district map, the depth of a rear yard at its lowest level shall be at least 25 per cent. of the depth of the lot, but need not exceed 25 feet at such level. However, for each one foot in excess of 10 feet of the depth of such rear yard at its lowest level there may be substituted one foot of depth of unoccupied space across the whole width of the front of the lot at the

curb level between the street line and the street wall of the building. In an E district on at least one side of every building located within a residence district there shall be a side yard along the side lot line for the full depth of the lot or back to the rear yard.

(*b*) In an E district an outer court or side yard at any given height shall be at least two and one-half inches in least dimension for each one foot of such height. On a lot not more than 50 feet in mean width an outer court or a side yard at any given height shall be at least two inches in least dimension for each one foot of such height. An outer court at any given point shall be at least two and one-half inches in least dimension for each one foot of length.

(*c*) In an E district no building located within a residence district as designated on the use district map shall occupy at the curb level more than 50 per cent. of the area of the lot, if an interior lot, or 70 per cent. if a corner lot, and above a level 18 feet above the curb no building shall occupy more than 30 per cent. of the area of the lot, if an interior lot, or 40 per cent. if a corner lot. In computing such percentage any part of the area of any corner lot in excess of 8,000 square feet shall be considered an interior lot.

Sec. 16. *Rear Yards.* (*a*) Except in A districts, for lots or portions of lots that are back to back there shall be rear yards extending along the rear lot lines of such lots or portions of lots wherever they are more than 55 feet back from the nearest street. Such rear yard shall be at least of the area and dimensions herein prescribed for the area district in which it is located at every point along such rear lot line. Within 55 feet of the nearest street no rear yards shall be required. No rear yard shall be required on any corner lot nor on the portion of any lot that is back to back with a corner lot.

(*b*) Where a building is not within a residence district as designated on the use district map, the lowest level of a rear yard shall not be above the sill level of the second story windows, nor in any case more than 23 feet above the curb level. Where a building is within a residence district the lowest level of a rear yard shall not be above the curb level, except that not more than 40 per cent. of the area of the yard may be occupied by the building up to a level 18 feet above the curb level. In the case of a church, whether within or without a residence district, such 40 per cent. may be occupied up to a level of 30 feet above the curb level.

(*c*) Chimneys or flues may be erected within a rear yard provided they do not exceed five square feet in area in the aggregate and do not obstruct ventilation.

(*d*) Except in A districts, where a building on an interior lot between lots for which rear yards are required runs through the block from street to street or to within 55 feet of another street, there shall be on each side lot line above the sill level of the second story windows and in any case above a level 23 feet above the curb

level a court of at least equivalent area at any given height to that required for an inner court at such height and having a least dimension not less than that required for an outer court at the same height.

(*e*) When a proposed building is on a lot which is back to back with a lot or lots on which there is a building or buildings having rear yards less in depth than would be required under this article, the depth of the rear yard of the proposed building shall not be required to be greater at any given level than the average depth of the rear yards directly back to back with it at such level, but in no case shall the depth of such rear yard be less at any height than the least dimension prescribed for an outer court at such height.

Sec. 17. *Courts.* (*a*) If a room in which persons live, sleep, work or congregate receives its light and air in whole or in part directly from an open space on the same lot with the building, there shall be at least one inner court, outer court, side yard or rear yard upon which a window or ventilating skylight opens from such room. Such inner court, outer court or side yard shall be at least of the area and dimensions herein prescribed for the area district in which it is located. Such rear yard shall be at least of the area and dimensions herein prescribed for an inner court in the area district in which it is located. In an A district, such inner court, outer court, side yard or rear yard shall be at least of the area and dimensions herein prescribed for a court in such district. The unoccupied space within the lot in front of every part of such window shall be not less than three feet, measured at right angles thereto. Courts, yards and other open spaces, if provided in addition to those required by this section, need not be of the area and dimensions herein prescribed. The provisions of this section shall not be deemed to apply to courts or shafts for bathrooms, toilet compartments, hallways or stairways.

(*b*) The least dimension of an outer court, inner court or side yard at its lowest level shall be not less than four feet, except that where the walls bounding a side yard within the lot are not more than 25 feet in mean height and not more than 40 feet in length, such least dimension, except in an E district, may be not less than three feet. Where any outer court opens on a street such street may be considered as part of such court.

(*c*) The least dimension of an inner court at any given height shall be not less than that which would be required in inches for each one foot of height for a rear yard of the same height, except that an inner court of equivalent area may be substituted for said court, provided that for such area its least dimension be not less than one-half of its greatest dimension. If an inner court is connected with a street by a side yard for each one foot that such side yard is less than 65 feet in depth from the street, one square foot may be deducted from the required area of the inner court for each 15 feet of height of such court. If the lot is not required under this resolu-

tion to have a rear yard, an outer court, not opening on a street, shall open at any level on an inner court on the rear line of the lot and such inner court shall be deemed a rear yard in such case.

Sec. 18. *Area District Exceptions.* (*a*) The area required in a court or yard at any given level shall be open from such level to the sky unobstructed, except for the ordinary projections of skylights and parapets above the bottom of such court or yard, and except for the ordinary projections of window sills, belt courses, cornices and other ornamental features to the extent of not more than four inches. However, where a side yard or an outer court opens on a street a cornice may project not over five feet into such side yard or outer court within five feet of the street wall of the building. And provided that in an E district a one-family residence, detached on all sides and having on one side a side yard of a clear and unobstructed width of not less than five feet, may have a cornice or eave projecting not more than two feet six inches into a side yard on the opposite side.[88]

(*b*) An open or lattice enclosed iron fire escape, fireproof outside stairway or solid-floored balcony to a fire tower may project not more than four feet into a rear yard or an inner court, except that an open or lattice enclosed iron fire escape may project not more than eight feet into a rear yard or into an inner court when it does not not occupy more than 20 per cent. of the area of such inner court.

(*c*) A corner of a court or yard may be cut off between walls of the same building provided that the length of the wall of such cut-off does not exceed seven feet.

(*d*) An offset to a court or yard may be considered as a part of such court or yard provided that it is no deeper in any part than it is wide on the open side and that such open side be in no case less than six feet wide.

(*e*) If a building is erected on the same lot with another building the several buildings shall, for the purposes of this article, be considered as a single building. Any structure, whether independent of or attached to a building, shall for the purposes of this article be deemed a building or a part of a building.

(*f*) If an additional story or stories are added to a building existing at the time of the passage of this resolution, the courts and yards of which do not conform to the requirements of this article, the least dimensions of yards and courts shall be increased from the top of the existing yard or court walls, as though they were of the prescribed dimensions at such heights and the carrying up of existing elevator and stair enclosures shall be exempted from the provisions of this article.

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[88] Par. *a* of sec. 18, amended as above, September 21, 1917.

ARTICLE V—GENERAL AND ADMINISTRATIVE

SEC. 19. *Interpretation; Purpose.* In interpreting and applying the provisions of this resolution, they shall be held to be the minimum requirements adopted for the promotion of the public health, safety, comfort, convenience and general welfare. It is not intended by this resolution to repeal, abrogate, annul or in any way to impair or interfere with any existing provision of law or ordinance or any rules, regulations or permits previously adopted or issued or which shall be adopted or issued pursuant to law relating to the use of buildings or premises; nor is it intended by this resolution to interfere with or abrogate or annul any easements, covenants or other agreements between parties; provided, however, that where this resolution imposes a greater restriction upon the use of buildings or premises or upon height of buildings or requires larger yards, courts or other open spaces than are imposed or required by such existing provision of law or ordinance or by such rules, regulations or permits or by such easements, covenants or agreements, the provisions of this resolution shall control.

SEC. 20. *Rules and Regulations; Modifications of Provisions.* The Board of Standards and Appeals, created by chapter 503 of the laws of 1916, shall adopt from time to time such rules and regulations as they may deem necessary to carry into effect the provisions of this resolution. Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this resolution the Board of Appeals shall have power in a specific case to vary any such provision in harmony with its general purpose and intent, so that the public health, safety and general welfare may be secured and substantial justice done. Where the street layout actually on the ground varies from the street layout as shown on the use, height or area district map, the designation shown on the mapped street shall be applied by the Board of Appeals to the unmapped streets in such a way as to carry out the intent and purpose of the plan for the particular section in question. Before taking any action authorized in this section the Board of Appeals shall give public notice and hearing.

No garage for more than five cars may be erected or extended and no building not now used as a garage for more than five cars may have its use changed to a garage for more than five cars on any portion of a street between two intersecting streets in which portion there exists an exit from or an entrance to a public school; or in which portion there exists any hospital maintained as a charitable institution; and in no case within a distance of 200 feet from the nearest exit from or entrance to a public school; nor within two hundred feet of any hospital maintained as a charitable institution. This protection shall also apply to duly organized schools for children

under 16 years of age, giving regular instruction at least five days a week for eight months or more each year, owned and operated by any established religious body or educational corporation. This limitation on the location of garages shall apply to unrestricted as well as business and residence districts; but in no case shall it apply to cases where applications for the erection or extension of garages or the conversion of existing buildings into garages may be pending before the Board of Appeals at the time of the adoption of this resolution.[59]

SEC. 21. *Unlawful Use; Certificate of Occupancy.* It shall be unlawful to use or permit the use of any building or premises or part thereof hereafter created, erected, changed or converted wholly or partly in its use or structure until a certificate of occupancy to the effect that the building or premises or the part thereof so created, erected, changed or converted and the proposed use thereof conform to the provisions of this resolution shall have been issued by the superintendent of buildings of the borough in which such building or premises is located, or, in the case of a tenement house as defined in the Tenement House Law, by the tenement house commissioner. In the case of such buildings or premises it shall be the duty of the superintendent of buildings or the tenement house commissioner, as the case may be, to issue a certificate of occupancy within ten days after a request for the same shall be filed in his office by any owner of a building or premises affected by this resolution, provided said building or premises, or the part thereof so created, erected, changed or converted, and the proposed use thereof, conforms with all the requirements herein set forth. Under rules and regulations of the Board of Standards and Appeals a temporary certificate of occupancy for a part of a building may be issued by the superintendent of buildings or the tenement house commissioner as the case may be. Upon written request from the owner, the superintendent of buildings or the tenement house commissioner, as the case may be, shall issue a certificate of occupancy for any building or premises existing at the time of the passage of this resolution certifying after inspection the use of the building or premises and whether such use conforms to the provisions of this resolution.

SEC. 22. *Enforcement, Legal Procedure, Penalties.* This resolution shall be enforced by the tenement house commissioner, the fire commissioner and by the superintendent of buildings in each borough under the rules and regulations of the Board of Standards and Appeals. The tenement house commissioner shall enforce the provisions herein contained in so far as they affect or relate to tenement houses as defined by the Tenement House Law. The superintendent of buildings shall in each borough enforce the provisions herein contained in

[59] Final paragraph added to sec. 20, June 6, 1919, and amended June 20, 1919.

so far as they relate to buildings or premises other than tenement houses. The fire commissioner shall enforce the provisions herein contained in so far as they relate to the use of completed buildings or premises, or part thereof, other than tenement houses. For any and every violation of the provisions of this resolution or of the rules and regulations adopted thereunder, the owner, general agent or contractor of a building or premises where such violation has been committed or shall exist, and the lessee or tenant of an entire building or entire premises where such violation has been committed or shall exist, and the owner, general agent, contractor, lessee or tenant of any part of a building or premises in which part such violation has been committed or shall exist, and the general agent, architect, builder, contractor or any other person who commits, takes part or assists in such violation or who maintains any building or premises in which any such violation shall exist, shall be liable to the same legal procedure and the same penalties as are prescribed in any law, statute or ordinance for violations of the Building Code, and for such violations the same legal remedies shall be had and they shall be prosecuted in the same manner as prescribed in any law or ordinance in the case of violations of said Building Code.

Sec. 23. *Amendments, Alterations and Changes in District Lines.* The Board of Estimate and Apportionment may from time to time on its own motion or on petition, after public notice and hearing, amend, supplement or change the regulations and districts herein established. Whenever the owners of 50 per cent. or more of the frontage in any district or part thereof shall present a petition duly signed and acknowledged to the Board of Estimate and Apportionment requesting an amendment, supplement, change or repeal of the regulations prescribed for such district or part thereof, it shall be the duty of the Board to vote upon said petition within 90 days after the filing of the same by the petitioners with the secretary of the Board. If, however, a protest against such amendment, supplement or change be presented, duly signed and acknowledged by the owners of 20 per cent. or more of any frontage proposed to be altered, or by the owners of 20 per cent. of the frontage immediately in the rear thereof, or by the owners of 20 per cent. of the frontage directly opposite the frontage proposed to be altered, such amendment shall not be passed except by the unanimous vote of the Board. If any area is hereafter transferred to another district by a change in district boundaries by an amendment, as above provided, the provisions of this resolution in regard to buildings or premises existing at the time of the passage of this resolution shall apply to buildings or premises existing at the time of passage of such amendment in such transferred area.

Sec. 24. *Completion and Restoration of Existing Buildings.* (*a*) Nothing herein contained shall require any change in the plans, con-

struction or designated use of a building for which a building permit has been heretofore issued, or plans for which are on file with the building superintendent or with the tenement house department at the time of the passage of this resolution, and a permit for the erection of which is issued within three months of the passage of this resolution and the construction of which, in either case, shall have been diligently prosecuted within a year of the date of such permit, and the ground story framework of which, including the second tier of beams, shall have been completed within such year, and which entire building shall be completed according to such plans as filed within five years from the date of the passage of this resolution. Provided, however, that any plan, other than a plan for a garage for more than five motor vehicles, filed with the building superintendent or with the tenement house department on July 26, or July 27, 1916, and a permit for the erection of which is issued prior to December 25, 1916, shall be deemed to have been filed at the time of the passage of this resolution. Provided, also, that the Board of Appeals may, after public notice and hearing, extend for not to exceed one year, or, in cases where one such extension may have been granted, may further extend for one year the time within which such ground-story framework, including the second tier of beams, shall be completed in any case, where, in the judgment of said Board, actual construction or fabrication was begun early enough to allow under the then existing conditions adequate time for completion as above specified, and where such construction or fabrication was diligently prosecuted and where such completion has been prevented by conditions impossible to foresee and beyond the control of the owner and builder.[60]

(*b*) Nothing in this resolution shall prevent the restoration of a building wholly or partly destroyed by fire, explosion, act of God or act of the public enemy or prevent the continuance of the use of such building or part thereof as such use existed at the time of such destruction of such building or part thereof or prevent a change of such existing use under the limitations provided in section 6. Nothing in this resolution shall prevent the restoration of a wall declared unsafe by the superintendent of buildings or by a board of survey.

Sec. 25. *When Effective.* This resolution shall take effect immediately.

No. 7. The Milwaukee, Wisconsin, Ordinance

120—An Ordinance

To create Sections 26.3 to 26.77 of the Milwaukee Code of 1914, constituting Chapter III-a thereof, regulating and restricting the

[60] Par. *a* of sec. 24, amended as above, December 15, 1916, October 19, 1917, and April 25, 1919.

location of trades and industries and the location of buildings designed for specified uses, and regulating and limiting the height and bulk of buildings hereafter erected, and regulating and determining the area of yards, courts and other open spaces surrounding buildings, and establishing the boundaries for the said purposes.

The Mayor and the Common Council of the City of Milwaukee do ordain as follows:

SEC. 1. There are added to the Milwaukee Code of 1914 twenty-eight (28) new sections constituting Chapter III-a thereof to read:

CHAPTER III-A

BUILDING ZONES

Article 1. Definitions

SEC. 26.3. Certain words in this chapter are defined as follows: Words used in the present tense include the future; the singular number includes the plural and the plural the singular; the word lot includes the word plot; the word building includes the word structure.

Private Garage. A private garage is a garage for not more than four automobiles, for storage only, and intended for private use, but in which space may be rented for storage only of not more than two non-commercial automobiles by others than the occupants of the building to which such garage is accessory.

Non-conforming Building or Use. A non-conforming building or use is one that does not conform with the regulations of a given use district.

Lot. A lot is a parcel of land in a single ownership occupied by not more than one building and the accessory buildings or uses customarily incident to it, including such open spaces as are required by this chapter.

Corner Lot. A corner lot is a lot or portion of a lot not more than fifty feet wide at the junction of and fronting on two intersecting streets. Any portion of a lot more than fifty feet distant from that street with the greater frontage shall comply with all the provisions of this chapter respecting interior lots.

Interior Lot. An interior lot is a lot other than a corner lot.

Depth of Lot. The depth of a lot is the mean distance from the street line of the lot to its rear line measured in the general direction of the side lines of the lot.

Street Line. The street line is the dividing line between the street and the lot.

Rear Yard. A rear yard is an open, unoccupied space on the same lot with a building between the rear line of the building and the rear line of the lot unobstructed to the sky.

Side Yard. A side yard is an open unoccupied space on the same lot with a building situated between the building and the side line of the lot and extending through from the street to the rear yard, or where no rear yard is required, to the rear line of the lot.

Outer Court. An outer court is an open, unoccupied space other than a yard on the same lot with a building extending to either the street, alley or the rear yard.

Inner Court. An inner court is an open, unoccupied space on the same lot with a building not extending to either the street, alley or the rear yard.

Width of a Yard or Court. The width of a yard or court is its least horizontal dimension at its lowest level.

Length of an Outer Court. The length of an outer court is the horizontal distance between the end opening on a street or rear yard and the end opposite such street or rear yard.

Height of a Yard or Court. The height of a yard or court is the vertical distance from the lowest level of such yard or court to the highest point of any bounding wall.

Half Story. A half story is a story which is situated in a sloping roof, the floor area of which does not exceed two-thirds of the floor area of the story immediately below it and which does not contain an independent apartment.

Building Area. The building area is the maximum horizontal projected area of a building and its accessories.

Definition of Other Words as in Chapter IV. Any words not defined herein shall be construed as defined or construed in Chapter IV, Milwaukee Code of 1914.

Article 2. Use Districts

Sec. 26.4. *Establishment of Use Districts.* For the purpose of regulating and restricting the location of trades and industries and the location of buildings designed for specified purposes, the City of Milwaukee is hereby divided into four classes of districts; residence districts; local business districts; commercial and light manufacturing districts; and industrial districts; as shown on the use district map which accompanies this chapter and is hereby declared to be part hereof. The use districts designated on said map are hereby established. The use district designations which accompany said use district map are hereby declared to be part thereof. No building, structure or premises shall be erected or used for any purpose other than a purpose permitted in the use district in which such building, structure or premises is located.

Sec. 26.41. *Uses Permitted in Residence Districts.* In a residence district no building, structure or premises shall be used and no building or structure shall be erected which is arranged, intended or de-

signed to be used except for one or more of the following specified uses:

1. Single family dwellings, two family dwellings, apartment or tenement houses.
2. Lodging or boarding houses, dormitories or convents.
3. Hotels.
4. Clubs, excepting clubs the chief activity of which is a service customarily carried on as a business.
5. Churches.
6. Schools, colleges, libraries or public museums.
7. Philanthropic and eleemosynary uses or institutions, other than correctional institutions.
8. Hospitals or sanitaria.
9. Railroad passenger stations.
10. Farming, truck gardening, nurseries or greenhouses.
11. Accessory uses customarily incident to the above uses. The term accessory use shall not include—

a. A business outside the building to which it is accessory, or which occupies a total floor area in excess of 25% of the floor area of one story of such building, or which by reason of the appearance of the building or premises, or the emission of odor, smoke, dust or noise or in any other way is objectionable or detrimental to the residential character of the neighborhood, or which involves features in design not customary in buildings for the above uses or any structural alteration of the building.

b. A garage other than a private garage on a lot occupied by not more than two families.

c. A group of private garages for more than four automobiles.

d. The storage of not more than one commercial vehicle.

12. Telephone central offices.
13. In undeveloped sections of the city a temporary building or use incidental to the residential development erected and so used for a period of two years from the date of the permit.

Sec. 26.42. *Uses Prohibited in Local Business Districts.* In a local business district no building or premises shall be used, and no building shall be erected which is arranged, intended or designed to be used for any of the following specified trades, industries or uses:

1. Any kind of manufacturing other than the manufacturing of products the major portion of which are to be sold at retail on the premises to the ultimate consumer.
2. A blacksmith shop or horseshoeing establishment.
3. A milk bottling or distributing station.
4. A carpet or bag cleaning establishment.
5. A coal yard or lumber yard.
6. Any trade, industry or use prohibited by Section 26.43 in a commercial and light manufacturing district.

No use permitted in a residence district by Section 26.41 shall be excluded from a local business district.

Sec. 26.43. *Uses Prohibited in Commercial and Light Manufacturing Districts.* In a commercial and light manufacturing district no building or premises shall be used, and no building shall be erected which is arranged, intended or designed to be used for any of the following specified trades, industries or uses:[61]

45. Any other trade, industry or use that is noxious or offensive by reason of the emission of odor, dust, smoke, gas or noise, but car barns or places of amusement shall not be excluded.

No use permitted in a residence district by Section 26.41 or in a local business district by Section 26.42 shall be excluded from a commercial and light manufacturing district.

Sec. 26.44. *Uses Prohibited in Industrial Districts.* In an industrial district no building shall be used, and no building shall be erected which is arranged, intended or designed to be used in whole or in part as a dwelling or tenement for one or more families. This provision shall, however, not prohibit the erection and maintenance of dwelling quarters in connection with any industrial establishment for watchmen employed upon the premises, nor of dwellings in undeveloped sections for a period of five years from the date of the permit. No other use permitted in a residence, local business or commercial and light manufacturing district shall be excluded from an industrial district.

Sec. 26.45. *Exceptions as to Existing Buildings and Uses.* Any non-conforming use existing at the time of the passage of this chapter may be continued and any existing building designed, arranged, intended or devoted to a non-conforming use may be reconstructed or structurally altered, and the non-conforming use therein changed subject to the following regulations:

1. The structural alterations made in such a building shall not during its life exceed fifty per cent of its assessed value, nor shall the building be enlarged, unless the use therein is changed to a conforming use.

2. No non-conforming use shall be extended by displacing a conforming use.

3. In a residence district no building or premises devoted to a use permitted in a local business district shall be changed into a use not permitted in a local business district.

4. In a residence or local business district no building or premises devoted to a use permitted in a commercial and light manufacturing district shall be changed into a use not permitted in a commercial and light manufacturing district.

5. In a residence, local business or commercial and light manu-

[61] The lists of industries pars. 1-44 is omitted. See the list given in the New York City resolution, p. 308 of this work and note to same.

facturing district no building devoted to a use excluded from a commercial and light manufacturing district shall be structurally altered if its use shall have been changed since the time of the passage of this chapter to another use also excluded from a commercial and light manufacturing district. A change of use for the purpose of this subdivision shall be deemed to include any change from a use included in an enumerated subdivision of Section 26.43 to a use included in another enumerated subdivision of Section 26.43.

6. In a residence, local business or commercial and light manufacturing district no building devoted to a use excluded from a commercial and light manufacturing district shall have its use changed to another use which is also excluded from a commercial and light manufacturing district if the building shall have been structurally altered since the time of the passage of this chapter. A change of use for the purpose of this subdivision shall be deemed to include any change from a use included in an enumerated subdivision of Section 26.43 to a use included in another enumerated subdivision of Section 26.43.

Sec. 26.46. *Public Service Corporation Uses.* A structure or premises may be erected or used in any location by a public service corporation for any purpose which the railroad commission decides is reasonably necessary for the public convenience or welfare.

Article 3. Height Districts

Sec. 26.5. *Establishment of Height Districts.* For the purpose of regulating and limiting the height and bulk of buildings hereafter erected, the City of Milwaukee is hereby divided into four classes of districts; one hundred and twenty-five foot districts; eighty-five foot districts; sixty foot districts; and forty foot districts; as shown on the height district map which accompanies this ordinance and is hereby declared to be part hereof. The height districts designated on said map are hereby established. The height district map designations which accompany said height district map are hereby declared to be part thereof. No building or part of a building shall be erected except in conformity with the regulations herein prescribed for the height district in which such building is located.

Sec. 26.51. *Height Limitations in One Hundred and Twenty-five Foot Districts.* In a one hundred and twenty-five foot district no building shall be erected to a height in excess of one hundred and twenty-five feet, and no buildings used in any part for residence purposes shall be in excess of eight stories; but nothing in this section shall prevent the erection on a business building of a tower, to a height of two hundred and twenty-five feet, provided: (1) that the area of such tower above the general height limit fixed for buildings by the preceding section shall not be in excess of twenty-five per

cent of the area of the building; and (2) that an open space shall be left above the general height limit fixed for buildings by this section on each and every lot line which is not also a street line, such open space being at least of the minimum dimensions prescribed by Section 26.61 for a side yard in an A area district for a building having a height equal to the maximum height of the tower above the curb level.

Sec. 26.52. *Height Limitations in Eighty-five Foot Districts.* In an eighty-five foot district no building shall be erected to a height in excess of eighty-five feet, and no building used in any part for residence purposes shall be in excess of six stories.

Sec. 26.53. *Height Limitations in Sixty Foot Districts.* In a sixty foot district no building shall be erected to a height in excess of sixty feet, and no building used in any part for residence purposes shall be in excess of four stories.

Sec. 26.54. *Height Limitations in Forty Foot Districts.* In a forty foot district no building, except as hereinafter provided for, shall be erected to a height in excess of forty feet, and no building used in any part for residence purposes by more than one family shall be in excess of two and one-half stories; provided, however, that in a local business district where a building is used for business purposes only, this height may be increased by not to exceed ten feet.

A building used as a single family residence, erected on a lot providing a side yard of forty feet in width on each side of said building, may be erected to a height of forty-five feet.

Sec. 26.55. *Exceptions to Height Limitations.* The provisions of this article shall not apply to the erection of the following structures:

1. Chimneys, flues, grain elevators or gas holders.

2. Water towers or tanks other than those located on the roof of a building.

3. Bulkheads, elevator inclosures, towers, monitors, penthouses, skylights or water tanks occupying in the aggregate less than twenty-five per cent of the area of the roof on which they are located.

4. Parapet walls or cornices extending above the height limit not more than five feet.

5. Monuments, towers, spires, church roofs, domes, cupolas or belfries for ornamental purposes and not used for human occupancy.

6. Churches, convents, schools, dormitories, colleges, libraries, public museums, hospitals and sanitaria in a forty or sixty foot height district; provided, however, that such buildings or portions thereof exceeding the height limit of the district be set back from lot lines a distance equal to ½ the height of such building or portion thereof and also be set back from the street or alley lines a distance equal to ½ the height of such building or portion thereof less 10 feet.

7. Structures erected prior to the passage of this chapter, the

foundations of which have been completed and which were designed to carry structures above the height provided herein, shall not exceed the height provided for in the design of the foundation and in no event shall exceed the 185 ft. height, provided, however, that such structures shall be completed within five (5) years from the date of the passage and publication of this chapter.

Article 4. Area Districts

Sec. 26.6. *Establishment of Area Districts.* For the purpose of regulating and determining the area of yards, courts and other open spaces for buildings hereafter erected, the City of Milwaukee is hereby divided into four classes of area districts: A, B, C and D; as shown on the area district map which accompanies this chapter and is hereby declared to be part hereof. The area districts designated on said map are hereby established. The area district map designations which accompany said area district map are hereby declared to be a part thereof. No building or part of a building shall be erected and no existing building shall be altered, enlarged or rebuilt except in conformity with the regulations herein prescribed for the area district in which such building is located.

Required Yards and Courts. Every room in which one or more persons live, sleep, work or congregate, except storage rooms or other rooms where the nature of the occupancy does not require direct light and air from the outside, shall have a window area equal to one-tenth of the floor area of the room. Such windows and others which are required by the building code shall open directly either upon a street or alley or upon a rear yard, side yard, outer court or inner court located upon the same lot and conforming to the requirements prescribed by this article as to its minimum area and least dimensions.

Yards and Courts, When Not Required. The provisions of this article shall not be deemed to apply to courts or shafts for bathrooms, toilet compartments, hallways or stairways, nor shall they apply to yards and courts which may be provided in addition to those required by this article.

No Reduction of Yards or Courts Allowed. No lot area shall at any time be so reduced or diminished that the yards, courts or open spaces shall be smaller than prescribed by this article.

Sec. 26.61. *Regulations in A Districts.* The following regulations shall apply to A Districts:

Rear Yards. No rear yard shall be less than ten feet wide on an interior lot, nor less than five feet wide on a corner lot for a building two stories or less in height. At each additional story height the width of such rear yard shall be increased one foot.

Side Yards. No side yard shall be less than three feet wide for a

building two stories or less in height and eighty feet or less in length. At each additional story height the width of such side yard shall be increased one foot, and for any additional length the width of such side yard shall be further increased at the rate of one foot in twenty feet.

Outer Courts. No outer lot-line court shall be less than three feet wide for a court two stories or less in height and forty feet or less in length. At each additional story height the width of such court shall be increased one foot, and for any additional length the width of such court shall be further increased at the rate of one foot in fifteen feet.

No outer court not on a lot line shall be less than six feet wide for a court two stories or less in height and forty feet or less in length. At each additional story height the width of such court shall be increased one foot, and for any additional length the width of such court shall be further increased at the rate of one foot in ten feet.

Inner Courts. No inner lot-line court shall be less than six feet in width nor less than sixty square feet in area for courts two stories or less in height, except that an inner lot-line court one story high shall be not less than four feet wide and not less than forty square feet in area. At each additional story height every such court shall be increased by at least one lineal foot in its length and one lineal foot in its width.

No inner court not on a lot line shall be less than ten feet in width nor less than one hundred and fifty square feet in area for courts two stories or less in height. At each additional story height every such court shall be increased by at least one lineal foot in its length and one lineal foot in its width.

Exceptions. Any building erected or used in any part for residence purposes shall be erected in conformity with the provisions prescribed by Section 26.62 for B districts, and as provided for in Section 26.65.

Sec. 26.62. *Regulations in B Districts.* The following regulations shall apply in B Districts:

Rear Yards. No rear yard shall be less than fifteen feet wide on an interior lot nor less than ten feet wide on a corner lot for a building two stories or less in height. At each additional story height the width of such rear yard shall be increased one and one-half feet.

Side Yards. No side yard shall be less than four feet wide for a building two stories or less in height and sixty feet or less in length. At each additional story height the width of such side yard shall be increased one foot, and for any additional length the width of such side yard shall be further increased at the rate of one foot in fifteen feet. On a lot improved with two side yards if the southerly or easterly of such yards exceeds the width required by this paragraph by one foot the other side yard may be reduced in width one foot.

Outer Courts. No outer lot-line court shall be less than five feet wide for a court two stories or less in height and thirty feet or less in length. At each additional story height the width of such court shall be increased one foot, and for any additional length the width of such court shall be further increased at the rate of one foot in ten feet.

No outer court not on a lot line shall be less than eight feet wide for a court two stories or less in height and thirty feet or less in length. At each additional story height the width of such court shall be increased one foot, and for any additional length the width of such court shall be further increased at the rate of one foot in eight feet.

Inner Courts. No inner lot-line court shall be less than six feet in width nor less than sixty square feet in area for courts two stories or less in height. At each additional story height every such court shall be increased by at least one and one-half lineal feet in its length and one lineal foot in its width.

No inner court not on a lot line shall be less than ten feet in width nor less than one hundred and fifty square feet in area for courts two stories or less in height. At each additional story height every such court shall be increased by at least two lineal feet in its length and one and one-half lineal feet in its width.

Setbacks. Setbacks are required and shall conform to the regulations prescribed by Section 26.63 for setbacks in 'C' Districts.

Building Area. No building shall occupy more than seventy per cent of the area of an interior lot, nor more than eighty-five per cent of a corner lot.

Exceptions. For exceptions see Section 26.65.

Sec. 26.63. *Regulations in C Districts.* The following regulations shall apply in C Districts:

Rear Yards. No rear yard shall be less than twenty feet wide on an interior lot nor less than ten feet wide on a corner lot for a building two stories or less in height. For each additional story in height the width of such rear yard shall be increased three feet.

Side Yards. No side yard shall be less than five feet wide for a building two stories or less in height and fifty feet or less in length. For each additional story in height the width of such side yard shall be increased one and one-half feet, and for any additional length the width of such side yard shall be further increased at the rate of one foot in ten feet. On a lot improved with two side yards for each foot that the southerly or easterly of such side yards exceeds the width required by this paragraph the other side yard may be reduced one foot, but in no case shall such side yard be less than three feet wide. On a lot having a width of less than thirty-three and one-half feet at the time it is placed in a C District and improved with two side yards the width of each of such yards may be reduced one foot. On a vacant lot or on two adjacent vacant lots having a width of

thirty (30) feet or less, at the time they are placed in a C District and adjacent lots on both sides of such lots are thirty (30) feet wide or less with buildings already erected upon them which buildings are so located on the respective lots as to leave a side yard on the north or west side of such buildings of at least eighteen (18) inches and on the south or east side of such buildings of at least four (4) feet, the improvements upon such vacant lots may be so placed so as to leave a side yard on the north or west side of not less than eighteen (18) inches and on the south or east side of not less than four (4) feet.

Outer Courts. No outer lot-line court shall be less than seven feet wide for a court two stories or less in height and thirty feet or less in length. For each additional story in height the width of such court shall be increased one and one-half feet, and for any additional length the width of such court shall be further increased at the rate of one foot in eight feet.

No outer court not on a lot line shall be less than ten feet wide for a court two stories or less in height and thirty feet or less in length. For each additional story in height the width of such court shall be increased two feet, and for any additional length the width of such court shall be further increased at the rate of one foot in six feet.

Inner Courts. No inner lot-line court shall be less than eight feet in width nor less than one hundred square feet in area for courts two stories or less in height. For each additional story in height every such court shall be increased by at least three lineal feet in its length and two lineal feet in its width.

No inner court not on a lot line shall be less than fourteen feet in its width nor less than two hundred and eighty square feet in area for courts two stories or less in height. For each additional story in height every such court shall be increased by at least four lineal feet in its length and three lineal feet in its width.

Setbacks. Where in a residence district as designated on the use district map at least one-quarter of the frontage on either side of a street between two intersecting streets is improved with buildings and at least one-half of the buildings so situated conform to a minimum setback line no new building shall be erected and no existing building shall be reconstructed or altered to project beyond such setback line unless an open space be left on each side of the building beyond such setback line. Each of these open spaces shall have at every point a minimum width, in addition to the width of any prescribed yards or courts, equal to at least twice the number of feet that such point projects beyond such setback line, provided that on a lot between and adjoining two lots, each with a building projecting beyond such setback line, those portions of such open spaces that are back of the front line of the building with the lesser projection may be omitted.

Building Area. No building shall occupy more than fifty per cent of the area of an interior lot, nor more than sixty per cent of a corner lot, provided that when a building is used for business purposes only, no building shall occupy more than seventy (70) per cent of the area of an interior lot, nor more than eighty-five (85) per cent of a corner lot.

Number of Families Housed. No dwelling or apartment house shall hereafter be erected or altered to accommodate or make provision for more than fifty families on any acre of land nor more than a proportional number of families on a fractional part of any acre of land, provided, however, in a local business district not more than twenty families per acre may be housed. The maximum number of families which may hereafter be housed on any plot of ground shall not exceed the integral number obtained by multiplying the acreage of such plot, exclusive of the area within street lines, by fifty, or in a local business district by twenty.

Exceptions. For exceptions see Section 26.65.

Sec. 26.64. *Regulations in D Districts.* The following regulations shall apply to D Districts:

Rear Yards. No rear yard shall be less than twenty-five feet wide on an interior lot nor less than ten feet wide on a corner lot for a building two stories or less in height. For each additional story in height the width of such rear yard shall be increased six feet.

Side Yards. No side yard shall be less than six feet wide for a building two stories or less in height and fifty feet or less in length. For each additional story in height the width of such side yard shall be increased three feet, and for any additional length the width of such side yard shall be further increased at the rate of one foot in eight feet. At least one side yard shall be provided on every lot located in a residence district as designated on the use district map. On a lot having a width of less than thirty-seven feet at the time it is placed in a D District and improved with two side yards the width of each of such yards may be reduced one foot. On a lot having a width of less than thirty-three and one-half feet at the time it is placed in a D District and improved with two side yards the width of each of such yards may be reduced two feet. On a lot improved with two side yards for each foot that the southerly or easterly of such side yards exceeds the width required by this paragraph the other side yard may be reduced one foot, but in no case shall the side yard be less than three feet wide. On a vacant lot or on two adjacent vacant lots having a width of thirty feet or less at the time they are placed in a 'D' district and adjacent lots on both sides of such lots are thirty feet wide or less with buildings already erected upon them, which buildings are so located on the respective lots as to leave a side yard on the north or west side of such buildings of at least eighteen inches and on the south or east side of such buildings of at least four feet,

the improvements upon such vacant lots may be so placed as to leave a side yard on the north or west side of not less than eighteen inches and on the south or east side of not less than four feet.

Courts and Setbacks. All courts and setbacks shall conform to the regulations prescribed by Section 26.63 for courts and setbacks in C Districts. In a residence district as designated on the use district map all windows required by the building code shall open directly either upon a street or upon a rear yard or side yard, provided that on an interior lot having a width of less than thirty-five feet at the time it is placed in a D District such windows may open on an outer lot-line court.

Building Area. No building shall occupy more than thirty per cent of the area of an interior lot, nor more than forty per cent of a corner lot, provided that on an interior lot containing at the time it is placed in a D District less than one-tenth of an acre a building may be erected so as to occupy not more than one thousand three hundred square feet nor more than thirty-five per cent of such lot.

Number of Families Housed. No dwelling or apartment house shall hereafter be erected or altered to accommodate or make provision for more than twenty families on any acre of land nor more than a proportional number of families on a fractional part of any acre of land. The maximum number of families which may hereafter be housed on any plot of ground shall not exceed the integral number obtained by multiplying the acreage of such plot, exclusive of the area within street lines, by twenty. The limitation imposed by this section shall, however, not prohibit the erection of a single family dwelling on any lot containing at the time it is placed in a D District an area of less than one-twentieth of an acre, nor the erection of a two-family dwelling on any lot containing at the time it is placed in a D District more than one-fifteenth of an acre.

Exception. Where a lot is not within a residence district as designated on the use district map all yards and building areas shall conform to the regulations prescribed by Section 26.63 for yards and building areas in C Districts.

Sec. 26.65. *General Regulations in Area Districts.* The following regulations shall apply to all area districts unless specifically excepted.

Height of Buildings Interpreted in Stories. In applying the requirements of this article the first story shall be considered as being not more than twenty feet high and for each additional thirteen feet or fraction thereof the building shall be considered to have at least one additional story.

Building Area Limitation, Where Applied. The limitation of building area in this article shall apply at the curb level in the case of a building located in a residence district as designated on the use district map and at the sill level of the second story windows, but not

more than twenty-three feet above the curb level in the case of a building located in a district other than a residence district as designated on the use district map.

Rear Yard, When Required. In B, C and D Districts there shall be a rear yard on every lot, or portion thereof, the rear line of which is more than fifty feet back from the front street line. In A Districts there shall be a rear yard on every lot, the rear of which abuts on an alley.

Rear Yard, When Not Required. A corner lot or an interior lot running through the block from street to street or to within fifty feet of another street shall not be required to provide a rear yard.

Rear Yard, Computation of Depth. In computing the depth of a rear yard abutting on a street or alley the measurement may include one-half the width of such street or alley, but in no case exceeding ten feet.

Rear Yard, Reduction in Size. On a lot less than one hundred feet deep the width of a rear yard required in preceding sections of this article for a building two stories or less in height may be reduced one per cent for each foot such lot is less than one hundred feet in depth, provided that such reduction shall in no case exceed one-half the required width. For each additional story in height the width of such yard shall be increased by the amounts required by preceding sections of this article.

Rear Yard, Level of. Where a lot is not within a residence district as designated on the use district map, the lowest level of a rear yard shall not be above the sill level of the second story windows nor in any case more than twenty-three feet above the curb level. Where a lot is within a residence district as designated on the use district map the lowest level of a rear yard shall not be above the curb level or the level of the ground back of the building whichever is the highest, and not above the sill level of the first story windows in any case.

Accessory Buildings. Accessory buildings in C and D Districts may occupy ten per cent of the lot area in addition to the building area limitations up to a height of fifteen feet measured from the ground floor of such buildings to the roofplate thereof, provided that in a residence district not more than forty per cent of required area of a rear yard is occupied by such accessory buildings. On a lot in a D District as designated on the area district map and not occupied by more than one family, where a lot exceeds 12,000 sq. ft. in area one additional automobile may be housed in addition to four automobiles for each 3,000 sq. ft. such lot exceeds 12,000 sq. ft. in area.

Chimneys and Flues. Chimneys or flues may be erected within a rear yard provided they do not exceed five square feet in area in the aggregate and do not obstruct ventilation.

Fire Escapes. Open or lattice enclosed iron fire escapes may pro-

ject not more than eight feet and fire-proof outside stairways or solid-floored balconies to fire towers may project not more than four feet into a rear yard.

Cut-Offs. A corner of a yard or court may be cut off between walls of the same building provided that the length of the wall of such cut-off does not exceed five feet.

Extension to Yards or Courts. Windows opening on a portion of a yard or court which is an extension to a yard or court conforming to the minimum requirements of a yard or court shall be deemed to comply with the provisions of this article. Such extension on which windows open shall not be deeper in any part than it is wide on the open side nor shall such open side be less than six feet wide. The area contained in an extension to a yard or court shall in no case be included in computing the required area of a yard or court.

Projections Allowed. The area required in a yard or court at any given level shall be open from such level to the sky unobstructed, except for the ordinary projections of skylights and parapets above the bottom of such court or yard, and except for the ordinary projections of window sills, belt courses, gutters, cornices and other ornamental features to the extent of not more than six inches, provided that wider cornices on the street front may turn the corner and project their full width into a side yard or outer court within five feet of the street wall of the building.

Bay Windows and Oriels. In a side yard not less than six feet wide an oriel or bay window not more than fifteen feet wide and without a gable may be constructed to extend not nearer than four and one-half feet from the side lot line.

Article 5. General Provisions

Sec. 26.7. *District Boundaries, How Determined.* The boundaries between districts are, unless otherwise indicated, either the center lines of streets or imaginary lines drawn parallel to and one hundred and twenty feet back from one or more of the street lines bounding the less restricted side or sides of a block. Where uncertainty exists or the street layout actually on the ground varies from the street layout as shown on the use, height, or area district map, the district boundary line shall be determined and recorded by the inspector of buildings in accordance with the intent of this chapter.

Division of Lots by Boundary Lines. Where a district boundary line divides a lot in a single ownership at the time of the passage of this chapter, the regulations for either portion of such lot may extend to the entire lot, but not more than twenty-five feet beyond the boundary line of the district for which such regulations are established.

Effect of Widening a Street. Whenever a street other than a boulevard or parkway is so widened as to be within one hundred and

twenty feet of a boundary line of a more restricted district, the less restricted district shall thereupon extend one hundred and twenty feet back from the widened street and such change in the district boundary lines shall have the same force and effect as though separately ordained.

Sec. 26.71. *Effect of This Chapter Upon Contracts and Agreements and Upon Other Laws and Regulations.* In their interpretation and application the provisions of this chapter shall be held to be the minimum requirements adopted for the promotion of the public safety, health, convenience and general welfare. It is not intended by this chapter to interfere with or abrogate or annul any easements, covenants or other agreements between parties; nor is it intended by this chapter to repeal, abrogate, annul or in any way to impair or interfere with any existing provision of law or ordinance or any rules, regulations or permits previously adopted or issued or which shall be adopted or issued pursuant to law relating to the use of buildings or premises; provided, however, that where this chapter imposes a greater restriction upon the use of buildings or premises or upon the height of buildings or requires larger yards, courts or other open spaces than are imposed or required by such existing provision of law or ordinance or by such rules, regulations or permits, the provisions of this chapter shall control.

Sec. 26.72. *Enforcement by Building Inspector; Issuance of Building Permits.* This chapter shall be enforced by the inspector of buildings. He shall issue no permit for the construction or alteration of any building or structure or part thereof plans and specifications and intended use for which are not in all respects in conformity with the provisions of this chapter. In case the intended use owing to its nature or the vagueness of its statement falls within more than one of the classes of uses established by Article 2 of this chapter such building or structure shall not be permitted in any district in which any such classes are prohibited.

Sec. 26.73. *Certificates of Occupancy.* It shall be unlawful to use or permit the use of any building or premises or part thereof hereafter created, erected, altered, changed or converted wholly or partly in its use or structure until a certificate of occupancy to the effect that the building or premises or the part thereof so created, erected, altered, changed or converted and the proposed use thereof conform to the provisions of this chapter shall have been issued by the inspector of buildings. It shall be the duty of the inspector of buildings to issue a certificate of occupancy within ten days after a request for the same is filed in his office by any owner of a building or premises affected by this chapter, provided said building or premises, or the part thereof so created, erected, altered, changed or converted, and the proposed use thereof, conforms with all the requirements of Article 4 of this chapter.

Fees for Certificates of Occupancy. There shall be charged for each certificate of occupancy for a single family dwelling and uses accessory thereto a fee of one dollar, and for all other uses a fee of two dollars. Such fees shall be paid into the city treasury and credited to the general city fund.

Temporary Certificates of Occupancy. Pending the issuance of a regular certificate, a temporary certificate may be issued for period not exceeding six months, during the completion of alterations or during partial occupancy of a building pending its completion. Such temporary certificates shall not be issued except under such restrictions and provisions as will adequately insure the safety of the occupants. No temporary certificate shall be issued if, prior to its completion, the building fails to conform to the provisions of the building ordinance or of this chapter to such a degree as to render it unsafe for the occupancy proposed.

Changes Requiring Issuance of New Certificate of Occupancy. If the conditions of use or occupancy of any building or premises or part thereof are substantially changed, or so changed as not to be in conformity with the conditions required by a certificate issued therefor, or if the dimensions or area of the lot upon which a building is located or its yards or courts are reduced, said certificate shall be void and the owner shall notify the inspector who shall order an inspection of the building premises or lot. If the building conforms to all the requirements of this chapter and of Chapter IV a new certificate shall be issued as herein provided.

Procedure in Case of Non-conformity. If, on any inspection, the conditions of a building or premises or its use or occupancy are found not to conform to the requirements of this chapter or of Chapter IV or the conditions of an existing certificate therefor, the inspector shall at once issue written notice to the owner, specifying the manner in which the building or premises or its use or occupancy fails to so conform, and the owner shall at once take steps to make it so conform, as directed by the inspector; and if it is necessary for the proper protection of the occupants he shall order the use or the occupancy of the building or premises modified or the building or premises vacated until its condition is made satisfactory in conformity with the requirements of this chapter and of Chapter IV, at which time a certificate shall be issued as herein provided.

Sec. 26.74. *Amendments and Changes in the Districts and Regulations Therefor by the Common Council.* The Common Council may from time to time on its own motion or on petition, after public notice and hearing as provided by law and after report by the Board of Public Land Commissioners, alter, supplement or change the boundaries or regulations herein or subsequently established. Whenever the owners of fifty per cent or more of the frontage in any district or part thereof present a petition duly signed and acknowledged to

the Council requesting an amendment, supplement or change in the regulations prescribed for such district or part thereof, it shall be the duty of the Council to vote upon said petition within ninety days after the filing of the same by the petitioners with the city clerk. In case a protest against a proposed amendment, supplement or change be presented, duly signed and acknowledged by the owners of twenty per cent or more of any frontage proposed to be altered, or by the owners of twenty per cent of the frontage immediately in the rear thereof, or by the owners of twenty per cent of the frontage directly opposite the frontage proposed to be altered, such amendment shall not be passed except by a three-fourths vote of the Council. If any area is hereafter transferred to another district by a change in district boundaries by an amendment, as above provided, the provisions of this ordinance in regard to buildings or premises existing at the time of the passage of this chapter shall apply to buildings or premises existing at the time of passage of such amendment in such transferred area.

Sec. 26.75. *Completion and Restoration of Existing Buildings.* Nothing herein contained shall require any change in the plans, construction or intended use of a building for which a building permit has been heretofore issued and the construction of which shall have been diligently prosecuted within six months of the date of such permit, and the ground story framework of which, including the second tier of beams, shall have been completed within six months, and which entire building shall be completed according to such plans as filed within two years from the date of the passage of this chapter. Nothing in this chapter shall prevent the restoration of a wall declared unsafe by the inspector of buildings.

Sec. 26.76. *Penalties.* Any person, firm, company or corporation owning, controlling or managing any building or premises wherein or whereon there shall be placed or there exists anything in violation of any of the sections of this chapter; or any person, firm, company or corporation who shall assist in the commission of any violation of these sections; or who shall build contrary to the plans or specifications submitted to and approved by the building inspector; or any person, firm, company or corporation who shall omit, neglect or refuse to do any act required in said sections shall, except where a special penalty is provided, be subject to a fine of not less than ten dollars nor more than two hundred dollars, together with the costs of the action, and in default of payment thereof, to imprisonment in the house of correction for a period of not less than one day nor more than six months, or until such fine and costs shall be paid; and every such person, firm, company or corporation shall be deemed guilty of a separate offense for each day such violation, disobedience, omission, neglect or refusal shall continue; provided, however, that

said accumulated penalties recoverable in any one action shall not exceed the sum of two thousand dollars.

SEC. 26.77. *Validity of Ordinance.* If any article, section, paragraph, subdivision, clause or provision of this chapter shall be adjudged invalid, such adjudication shall apply only to the article, section, paragraph, subdivision, clause or provision so adjudged, and the rest of this chapter shall remain valid and effective.

SEC. 2. This ordinance shall take effect and be in force from and after its passage and publication.

No. 8. THE ALAMEDA, CALIFORNIA, ORDINANCE[62]

Ordinance Establishing Districts or Zones and Regulating Therein the Use of Property, Height of Buildings, and Required Open Spaces for Light and Ventilation of Such Buildings

WHEREAS, the public interest, health, comfort, convenience, preservation of the public peace, safety, morals, order and the public welfare of the City of Alameda require the classification of the city into districts within some of which it shall be lawful and in others unlawful to erect, construct, alter, or maintain certain buildings or uses of property or to carry on certain trades or callings or within which the height and bulk of future buildings shall be limited.

Now, therefore, be it ordained by the Council of the City of Alameda as follows:

ARTICLE I—USE DISTRICTS

SEC. 1. *Use Districts.* For the purpose of regulating and restricting the location of trades and industries, businesses and residences and buildings designed for specified uses, the City of Alameda is hereby divided into the following classes of Residence, Business and Industrial Use Districts:

RESIDENCE DISTRICTS OF

Class I—Single family dwellings.

Class II—Dwellings, flats, clubs, railroad shelter stations, apartment houses, hotels without stores.

BUSINESS AND PUBLIC USE DISTRICTS OF

Class III—Retail businesses, trades and professions, including residences of *Classes I* and *II*.

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[62] No. 144, N. S., adopted Feb. 18, 1919; here given as amended by No. 149, N. S., May 28, 1919.

Class IV—Schools, public and semi-public buildings, churches, playgrounds, green-houses and parks, including residences of *Class I.*

Class V—Public garage, dyeing and cleaning, wholesale business, bath houses, amusement parks, oil stations and feed business, including residence and business uses of *Classes I, II, III* and *IV.*

Class VI—Hospitals, sanitariums, charitable institutions, including residences of *Classes I* and *II.*

INDUSTRIAL DISTRICTS OF

Class VII—Factories not obnoxious, warehouses, including any business use, but excluding new residences of any kind.

Class VIII—Obnoxious and odor producing factories, including any business use, but excluding new residences of any kind.

As herein defined and limited and as shown on the map entitled "Diagram of Use Districts, Building Zone Map of the City of Alameda, February 4, 1919," filed in the office of the City Clerk of the City of Alameda, February 4, 1919, which is hereby declared to be part hereof. The Use Districts designated herein and on said map are hereby established. No building or premises shall be erected or used for any purpose other than a purpose permitted in the Use District of the class in which such premises, building or property is located.

SEC. 2. *Residence Districts of Class I:* In residence districts of *Class I* no building, structure or premises shall be erected, constructed, altered or maintained, except as provided in section 12 hereof, which shall be used for or designed or intended to be used for any purpose other than that of a single family dwelling.

The following described residence districts of *Class I* are hereby established:

All of the City of Alameda except the districts established and included in Residence Districts of *Class II* or in Business or Industrial Use Districts as hereinafter described and shown on the aforesaid map.

SEC. 3. *Residence Districts of Class II:* In residence districts of *Class II* no building structure or premises shall be erected, constructed, altered or maintained, except as provided in section 12 hereof, and which shall be designed, intended or used for any purpose other than a single family dwelling, flat, group dwelling, boarding house or lodging house, club, fraternity dwelling, apartment or hotel without stores.

SEC. 4. *Business and Public Use Districts of Class III—Retail Business and Offices:*

(*a*) In business and public use districts of *Class III,* no building, structure or premises shall be erected, constructed or maintained, except as provided in section 12 hereof which shall be designed, in-

tended or used for any purpose other than those specified in Residence Districts of *Classes I* and *II* hereof and those of a business or professional office, retail trade, theatre or store, with the exceptions made in paragraph (*b*) of this section.

(*b*) In a Business and Public Use District of *Class III* no building or premises shall be used and no building shall be erected which is arranged, intended or designed to be used for any of the following specified trades, industries or uses, except as provided in section 12 hereof:

[The list of uses is omitted. For a list of uses, see p. 308.]

(*c*) In any Business or Public Use District no building or premises shall be used, and no building shall be erected, which is arranged, intended or designed to be used for any trade, industry or use that is noxious or offensive by reason of the emission of odor, dust, smoke, gas or noise.

(*d*) In any Business or Public Use District no building or premises shall be used, and no building shall be erected, which is arranged, intended or designed to be used for any kind of manufacturing, except that any kind of manufacturing or wholesale business not included within the prohibitions of paragraph (*a*) and (*b*) of this section may be carried on, provided not more than 25 per cent of the ground floor space nor of the total floor space of the building is so used. The printing of a newspaper shall not be deemed manufacturing.

Sec. 5. *Business and Public Use Districts of Class IV.* In Business and Public Use Districts of *Class IV*, no building, structure or premises shall be erected, constructed, altered or maintained, except as provided in section 12 hereof which shall be designed, intended or used for any purpose other than that of an Assembly Hall, church, public or private school, playground structure, park structure, public art gallery, museum, library, fire house or convenience station, or other public or semi-public building, or residence use specified in *Class I*.

Sec. 6. *Change of Classification:* When an established Business and Public Use District of *Class IV* adjoins and touches the boundaries of a Residence District of *Classes I* or *II* on three of its sides, or is completely surrounded by the same, upon the change of use of said district or of any portion thereof to a use specified for Residence Districts of *Classes I* or *II*, said property shall thereafter be classified as a Residence District of *Class I* or of *Class II* respectively.

Sec. 7. *Business and Public Use Districts of Class V: Garages, Etc.* In Business and Public Use Districts of *Class V* no building, structure, or premises shall be erected, constructed, altered or maintained, except as provided in section 12 hereof, which shall be designated, intended or used for any purpose other than those permitted

in a Residence District of *Classes I* and *II* and in Business and Public Use Districts of *Classes III* and *IV* hereof, and that of a bath house, commercial recreation park, undertaking parlor, public garage, gasoline or oil supply station, feed, fuel or construction material business, dyeing and dry cleaning establishment or wholesale business.

SEC. 8. *Business and Public Use Districts of Class VI—Hospitals and Institutions.* In Business and Public Use Districts of *Class VI* no building, structure or premises shall be erected, constructed, altered or maintained, except as provided in section 12 hereof, which shall be designed, intended or used for any purpose other than that of a public or private hospital, sanitarium, asylum or institute for the treatment of disease, clinic, day nursery or other charitable institution or Residence Use specified in *Classes I* or *II*.

SEC. 9. *Industrial Districts of Class VII—Ordinary Factories and Warehouses.*

(*a*) In Industrial Districts of *Class VII*, no building, structure or premises shall be erected, constructed, altered or maintained, except as provided in section 12 hereof which shall be designed, intended or used for any purpose other than that of a retail or wholesale business such as specified in Business and Public Use Districts of *Classes II, III, IV, V* and *VI*, and that of the following specified trades, industries or uses:—

Blacksmithing or horseshoeing, Bottle or glass factory, Brewing or distilling of liquors, Brick yard or kiln, Carpet cleaning or carpet beating, Coal yard or coal or fuel storage, dry dock or other dock or wharf, Electric Central station power plant, Food Product, cereal and similar factories, Fruit packing and curing, Hay barn or warehouse, Junk, scrap paper or rag storage or baling, Livery stable, Feed yard, Veterinary hospital or riding academy, Lumber yard, Machine shop, Mattress or bed-spring factory, Milk Bottling and Distributing Station, Nursery or greenhouse, Oil cloth and linoleum manufacture, Paint, oil, varnish or turpentine manufacturing, Planing Mill or Sash and door, box or woodwork factory, Printing ink manufacture, Railroad freight yard, team track freight Depot or shed, Roller mill, Rubber manufacture from crude material, Sheet Metal Works, Ship building plant or ship yard, Silk, cotton or other mill using power, Shoddy manufacture or wool scouring, Stable for more than one horse, Starch, glucose or dextrine factory, Stone or monumental works, Rock, sand gravel, loading, distributing or receiving station, Sugar refining, Tar distillation or manufacture, Tar roofing or tar waterproofing manufacture, Wood yard.

(*b*) It shall be unlawful for any person, firm or corporation to erect, establish, carry on or maintain, except as provided in section 12 hereof, within an Industrial District of *Class VII* as described in paragraph (*a*) of this section, any industry engaged in making or preparing soap, candles, glue, tallow oil, chemicals, gunpowder or

other explosives, bone boiling, fat boiling, tanning, dressing or preparing skins, hides or leather, or crematory.

(*c*) In Industrial Districts of *Class VII* no buildings or premises shall be designed, intended or used for any trade, industry, or use that is noxious or offensive by reason of the emission of odor, dust, smoke, gas or noise.

Sec. 10. *Industrial Districts of Class VIII—Noxious Industries.* In Industrial Districts of *Class VIII,* no building, structure or premises shall be erected, constructed or maintained, except as provided in section 12 hereof, which shall be designed, intended or used for any purpose other than a Business or Industrial Use.

Sec. 11. *No New Dwellings Permitted in Industrial Districts.* In any Industrial District of *Class VII* or of *Class VIII* no new building or structure shall be hereafter designed, erected, constructed or maintained, except as provided in section 12, hereof for dwelling, sleeping or human housing purposes, provided however that in connection with any industrial plant one single family dwelling quarters for one watchman employed in said plant may be built and used by him and his family.

Sec. 12. *Existing Building and Premises.*

(*a*) In any building or premises any lawful use existing therein at the time of the passage of this ordinance may be continued therein, although not conforming to the regulations of the use district in which it is maintained, provided that no structural alterations requiring a building permit shall be made therein and no new building or addition be erected, except in conformity with the requirements of this ordinance, or unless required by law.

(*b*) No existing building designed, arranged, intended or devoted to a use not permitted by this article in the Use District in which such use is located shall be enlarged, extended, reconstructed or structurally altered unless such use is changed to a use permitted in the Use District in which such building is located.

Sec. 13. *Reversion of Exceptions.*

(*a*) If at any time any building or premises now erected or maintained, which by the terms of this ordinance, or of a later ordinance, or amendment thereto, is declared to be an exception to the Use District, either completely or partially surrounding such exception, shall be changed from its present use to a different use or destroyed, or more than forty (40) per cent burned, moved or altered, then and without further action by the City Council, the said premises on which said building or structure was erected or maintained, shall from and after the time of such destruction, burning, removal or alteration be deemed to be classified without further notice as a district of the same class of use as the surrounding or adjoining district to which said premises formed originally an exception, and the same shall be subject to all the restrictions of such classification.

(*b*) *Doctors' Offices in Dwellings.* Single family or other type of dwellings may lawfully include the office of a physician, surgeon, dentist, or one artist's or musician's studio without violating the provisions of any classification in any paragraph of this ordinance.

(*c*) *Private Garages and Other Outbuildings.* Private garages and the customary outbuildings may be located or maintained as accessory to any building lawfully within the boundaries of any district herein specified.

A private garage for more than five motor vehicles shall not be deemed accessory.

ARTICLE II—HEIGHT DISTRICTS

SEC. 14. *Height Districts.* For the purpose of regulating and limiting the height and bulk of buildings hereafter erected the City of Alameda is hereby divided into the following classes of Height Districts:

2½ Story Height Districts—Limited to a maximum of two stories and attic, not to exceed a total height of 35 feet to finished ceiling line of the attic story above the curb.

3 Story Height Districts—Three stories not to exceed 40 feet.

4 Story Height Districts—Four stories not to exceed 50 feet.

8 Story Height Districts—Eight stories not to exceed 90 feet, as hereinafter defined and limited and as shown on the map entitled "Diagram of Height Districts, Building Zone Map of the City of Alameda, February 4, 1919," filed in the office of the City Clerk of the City of Alameda, Feb. 4, 1919, and which is hereby declared to be part hereof. The Height Districts designated on said map are hereby established. No building or part of a building shall be erected, constructed, or altered, except in conformity with the regulations herein described for the Height District in which such building is located.

SEC. 15. *2 1/2 Story Height Districts.* In a 2½ Story Height District no building shall be erected hereafter to a height in excess of two stories and a finished attic nor more than thirty-five (35) feet to the finished ceiling line of the second story, above the established curb grade of the street in front of the building, or adjoining ground level, except as provided in section 19 hereof.

The following described 2½ Story Height Districts are hereby established:

All of the City of Alameda not otherwise described or designated as in a 3 Story, 4 Story, or an 8 Story Height District, by sections 16, 17 and 18 hereof, as shown on said last mentioned map, provided, however, that an apartment house may be erected in this district to a height of three stories as prescribed in section 16.

SEC. 16. *3 Story Height Districts.* In a 3 Story Height Dis-

trict no building shall be erected hereafter to a height in excess of three stories, nor more than forty (40) feet to the finished ceiling line of the third story above the established curb grade of the street in front of the building, or adjoining ground level, except as provided in section 19 hereof.

SEC. 17. *4 Story Height Districts.* In a 4 Story Height District no building shall be erected hereafter to a height in excess of four stories nor more than fifty (50) feet to the finished ceiling line of the fourth story above the established curb grade of the street in front of the building, or adjoining ground level, except as provided in section 19 hereof.

SEC. 18. *8 Story Height Districts.* In an 8 Story Height District no building shall be erected hereafter to a height in excess of eight stories, nor more than ninety (90) feet to the finished ceiling line of the eighth story above the established curb grade in front of the building, or adjoining ground level, except as provided in section 19 hereof.

SEC. 19. *Height District Exceptions.*

(*a*) No building shall hereafter be erected in any Height District to a height in excess of four stories nor more than fifty (50) feet to the finished ceiling line of the fourth story above the established curb grade of the street in front of the building unless the width of said building on each and every abutting public street is at least one-half of its height.

(*b*) Towers, chimneys, spires, gas or water tanks completely closed in with walls down to the ground or to the adjoining lower story of the building may be permitted as to a greater height than allowed in the class of Height District in which the building is located, provided that no such exception shall cover at any level more than fifteen (15) per cent in area of the lot.

(*c*) Nothing in this article shall prevent the projection of a cornice beyond the street wall to an extent not exceeding five feet in any case.

(*d*) No building shall hereafter be erected in any height district to a height in excess of the width of the street upon which it abuts, measured at right angles from the front property line to the opposite property line.

SEC. 20. *Area Requirements.* For the purpose of regulating and determining the area of yards, courts and other open spaces for buildings hereafter erected, the following area requirements are hereby established. No building or part of a building shall be erected except in conformity with the area regulations herein prescribed for the Use District in which said building is located. Unless otherwise expressly provided the term rear yard, side yard, outer court or inner court when used in this article shall be deemed to refer only

to a rear yard, side yard, outer court or inner court required by this article. No lot area shall be so reduced or diminished that the yards, courts, or open spaces shall be smaller than prescribed in this article.

SEC. 21. In Industrial Use Districts of *Class VII* or of *Class VIII*, a court or a yard where required by section 26 of this ordinance shall be at least two inches in least dimension for each one foot of such height, with a depth of not less than five (5) feet.

SEC. 22. In Business and Public Use Districts of *Classes III, IV, V* and *VI*, and in each business, store or office building in Industrial Districts of *Classes VII* and *VIII* a court or a yard, where required by section 26 of this ordinance, of each building hereafter constructed, of whatever use, shall be of the same least dimensions and area as required for tenement houses in the "State Tenement House Act."

SEC. 23. Behind every building hereafter erected in a Business or Public Use District of *Classes III, IV, V* or *VI*, outside the fire limits of the City of Alameda, there shall be a rear yard extending across the entire width of the building. Such yard shall be at every point open and unobstructed from the ground to the sky, except that in the case of corner lots the rear yard may begin at the top of the entrance story. Every part of such yard shall be directly accessible from every other part thereof. The depth of such yard shall be measured at right angles from the rear lot line to the extreme rear part of the building. Each outer court, inner court or side yard of each building hereafter erected outside the fire limits in said Business and Public Use Districts, shall be of the same least dimensions and area as required for tenement houses in the "State Tenement House Act," provided however that in the case of corner lots no rear yard shall be less than ten (10) feet in depth and in the case of interior lots no rear yard shall be less than twelve (12) feet in depth.

SEC. 24. In Residence Use Districts of *Classes I* or *II* each court, side yard, or rear yard of each building, of whatever use, shall be of the same least dimensions and area as required for a dwelling in the "State Dwelling House Act."

SEC. 25. *Home Area Districts.* For the purpose of regulating and limiting congestion in home neighborhoods for buildings hereafter erected, Home Area Districts in the City of Alameda are hereby established, in which no building nor structure shall hereafter be erected, constructed or altered which is not detached at least four (4) feet from every other building or which covers more than fifty (50) per cent in area of the lot, as follows: All of that portion or those portions of the City of Alameda established as Residence Use Districts of *Class I* as described in section 2 of this ordinance and as shown on the map entitled "Diagram of Use Districts, etc."

SEC. 26. *Yards and Courts.* If a room in which persons live, sleep, work or congregate receives its light and air in whole or in part directly from an open space on the same lot with the building, there shall be one inner court, outer court, side yard or rear yard from which a window or ventilating skylight opens from such room. Such inner court, outer court or side yard shall be at least of the area and dimensions herein prescribed for a court in such district. The unoccupied space within the lot in front of every part of such window shall be not less than 3 feet, measured at right angles thereto. Courts, yards and other open spaces if provided in addition to those required by this section, need not be of the area and dimensions herein prescribed. The provisions of this section shall not be deemed to apply to courts or shafts for bathrooms, toilet compartments, hallways or stairways.

SEC. 27. If a building is erected on the same lot with another building the several buildings shall, for the purpose of this article, be considered as a single building. Any structure, whether independent of or attached to a building, shall for the purpose of this article be deemed a building or a part of a building.

ARTICLE IV—DEFINITIONS

SEC. 28. *Definitions.* Certain words in this ordinance are defined for the purposes hereof as follows:

(*a*) Words used in the present tense include the future; the singular number includes the plural and the plural the singular; the word "lot" includes the word "plot," the word "building" includes the word "structures."

(*b*) The "width of the street" is the mean of the distances between the sides thereof within a block. Where a street borders a public place or public park the width of the street is the mean width of such street plus the width, measured at right angles to the street line, of such public place or public park.

(*c*) The "curb level" for the purpose of measuring the height of any portion of a building, is the mean level of the curb in front of such portion of the building. But where a building is on a corner lot the curb level is the mean level of the curb on the street of greatest width. If such greatest width occurs on more than one street the curb level is the mean level of the curb on that street of greatest width which has the highest curb elevation. The "curb level" for the purpose of regulating and determining the area of yards, courts, and open spaces is the mean level of the curb at that front of the building where there is the highest curb elevation. Where no curb elevation has been established or the building does not adjoin the street the average ground level of the lot shall be considered the curb level.

(*d*) A "street wall" of a building, at any level, is the wall or part of the building nearest to the street line.

(*e*) The "height" of a building is the vertical distance measured from the curb level to the finished ceiling line of the highest story of the building. Where a building is a tenement house, hotel or boarding house or dwelling as respectively defined in the State Tenement House Law, State Hotel and Lodging House Law or State Dwelling House Law, the height of the building on the street line shall be measured as prescribed in said law for the measurement of the height of a tenement house hotel, lodging house and dwelling house, and such measurement shall be from the curb level as that term is used in said law.

(*f*) The "depth of a lot" is the mean distance from the street line of the lot to its rear line measured in the general direction of the side lines of the lot.

(*g*) A "rear yard" is an open, unoccupied space on the same lot with a building between the rear line of the building and the rear line of the lot.

(*h*) The "depth of a rear yard" is the mean distance between the rear line of the building and the rear line of the lot.

(*i*) Lots or portions of lots shall be deemed "back to back" when they are on opposite sides of the same part of a rear line common to both and the opposite street lines on which the lots front are parallel with each other or make an angle with each other of not over 45 degrees.

(*j*) A "court" is an open unoccupied space, other than a rear yard, on the same lot with a building. A court not extending to the street or to a rear yard is an "inner court." A court extending to the street or to a rear yard is an "outer court." A court on the lot line extending through from the street to a rear yard or another street is a "side yard."

(*k*) The "height of a yard or a court" at any given level shall be measured from the lowest level of such yard or court as actually constructed or from the curb level, if higher, to such level. The highest level of any given wall bounding a court or yard shall be deemed to be the mean height of such wall. Where a building is a tenement house, as defined in the State Tenement House Law, the height of a yard or a court shall be measured as prescribed in such law.

(*l*) The "least dimension" of a yard or court at any level is the least of the horizontal dimensions of such yard or court at such level. If two opposite sides of a yard or court are not parallel the horizontal dimension between them shall be deemed to be the mean distance between them.

(*m*) The "length of an outer court" at any given point shall be measured in the general direction of the side lines of such court

from the end opposite the end opening on a street, or a rear yard, to such point.

(*n*) *Dwelling.* A dwelling is any house or building or portion thereof which is occupied in whole or in part as the home, residence or sleeping places, either permanent or transient of one or more human beings.

(*o*) *Types of Dwellings.* For the purpose of this ordinance the types of dwellings are defined as follows:

Single family dwellings
Two family dwellings
Group dwellings
Apartments or tenements.

(*p*) *A Single Family Dwelling* is a dwelling for one family alone, having but one kitchen and within which not more than five persons may be lodged for hire at one time.

(*q*) *A Two Family Dwelling* is a building or structure having under one and the same roof two single family dwellings, each dwelling of which shall have a separate ground floor entrance on the outside of the building.

(*r*) *A Group Dwelling* is a building designed for more than one single family dwelling, each dwelling of which shall have a ground floor entrance on the outside of the building and be entirely separated from each other private dwelling by a vertical wall.

(*s*) *An Apartment* is a tenement as defined under the State Tenement House Law.

(*t*) *A Boarding House* is a building in which more than five persons are lodged for hire and in which there are not more than twenty-five sleeping rooms.

(*u*) *Story.* The term "Story" means a vertical distance from floor to ceiling.

(*v*) *An Attic* is a story under a sloping roof at the top of the building, the spring or cornice of the main roof of which is not more than two (2) feet above the floor of said attic. An attic story shall not use more than eighty (80%) per cent of the floor area of said attic story for rooms, baths or toilets. Walls of rooms and baths shall be not less than four (4) feet in height. The attic may be used only as permitted in the Alameda Housing Code.

(*w*) *A Detached Building* is one that is not less than six (6) feet distant, measured horizontally from any portion, except the cornice or eaves, of any other building.

(*x*) *A Public Laundry* is any building or grounds used for laundering for hire in which more than two persons are engaged in the business thereof.

All words and phrases not otherwise defined in this ordinance shall be interpreted as defined in the State Tenement Housing Act and the Alameda Housing Code.

ARTICLE V—GENERAL AND ADMINISTRATIVE

SEC. 29. *Interpretation: Purpose.* In interpreting and applying the provisions of this ordinance, they shall be held to be the minimum requirements adopted for the promotion of the public health, safety, comfort, convenience and general welfare. It is not intended by this ordinance to repeal or interfere with any existing provision of law or ordinance or any rules, regulations or permits previously adopted or issued or which may be adopted or issued pursuant to law relating to the use of buildings or premises; nor is it intended by this ordinance to interfere with any easements, covenants, or other agreements between parties; provided, however, that where this ordinance imposes a greater restriction upon the use of buildings or premises or upon height of buildings or requires larger yards, courts or other open spaces than are imposed or required by such existing provisions of law or ordinances or by such rules, regulations or permits or by such easements, covenants or agreements, then, and in that case, the provisions of this ordinance shall control.

SEC. 30. *Unlawful Use: Certificates of Occupancy.* It shall be unlawful to use or permit the use of any building or premises or part thereof hereafter created, erected, changed or converted wholly or partly in its use or structure until a certificate of occupancy to the effect that the building or premises or the part thereof so created, erected, changed or converted and the proposed use thereof conform to the provisions of this ordinance shall have been issued by the building department. In the case of such premises or buildings it shall be the duty of the building department to issue a certificate of occupancy within ten days after a request for the same shall be filed in its office by any owner of a building or premises affected by this ordinance, provided said building or premises or the part thereof so created, erected, changed or converted, and the proposed use thereof, conforms with all the requirements herein set forth. A temporary certificate of occupancy for a part of a building may be issued by the building department. Upon written request of the owner the building department shall issue a certificate of occupancy for any building or premises existing at the time of the passage of this ordinance certifying after inspection the use of the building or premises and whether such use conforms to the provisions of this ordinance.

SEC. 31. *Enforcement, Legal Procedure, Penalties.* This ordinance shall be enforced by the Building Department, health inspector, health officer, city engineer, chief of police, fire marshal, or such other officer as may be designated by the City Charter or by ordinance of the City of Alameda. Any person, firm or corporation violating any of the provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than three hundred ($300.00) dollars, or by imprisonment

in the city jail for a period of not more than six (6) months or by both fine and imprisonment. Each such person, firm or corporation shall be deemed guilty of a separate offence for each and every day during any portion of which any violation of any provision of this ordinance is committed, continued or permitted by such person, firm or corporation and shall be punishable accordingly.

Sec. 32. *Building Permits.* No building permit shall be issued by the Building Department of the City for the erection or alteration of any building or structure contrary to the provisions of this ordinance.

Each application for a building permit hereafter filed with the City shall be accompanied by a statement as to the use, height and area of the building applied for, on a blank to be furnished by the City, on which shall also be shown an accurate block plan of the location of the building on the lot, drawn to a scale of 16 feet to the inch.

Sec. 33. *Changes Within Districts.*

(*a*) Changes and Reclassification within Residence Districts: Any portion of a residence district may be changed from *Class I* to *Class II,* or vice versa, in the manner following: A petition therefor, describing the change desired and signed by the owners of not less than twenty-five (25) per cent of the area of real property situated within a radius of two hundred (200) yards of the particular portion proposed to be changed, must be filed with the City Clerk. The petition may be accompanied by the plans or a sketch of such building or structure, if any, which is proposed to be erected in the place desired to be redistricted.

Immediately upon receipt of such a petition, the City Clerk shall cause to be posted along that portion of all the main streets within the radius aforementioned, and at least one (1) on each side of each block or fraction of block therein, notices of the filing of said petition; said notices shall be headed *"Notices of Redistricting"* in one (1) inch type or larger, briefly describing the change desired and notifying all persons having objections to appear before the next meeting of the City Council, giving date of same, and show cause why such proposed change should not be made; provided, that at least three (3) of said notices shall be posted on the side of the block in which the change is proposed, and three (3) on the side of the block opposite thereto; provided further, all of said notices shall be posted at least seven days before the time of said hearing.

At any time prior to said hearing any owner of real property situated within the radius aforesaid, may make written protests or objections to the proposed change, and deliver them to the City Clerk. At the time fixed, the City Council shall proceed to hear and pass upon the protests or objections so made, and its decision shall be final and conclusive; provided, however, the Council may adjourn

such hearings from time to time and may refer the matter to the City Planning Commission, Chamber of Commerce, Merchants Association, or other civic or improvement organizations, for an opinion and report on the proposed change, before rendering its decision.

Each petition or protest aforementioned shall have an affidavit annexed, certifying that each signature thereon is the bona-fide signature of the person whose name it purports to be. Such affidavit may be made and subscribed before the City Clerk or a Notary Public.

(*b*) Reclassification Within Business Districts—Any portion of a Business or Public Use District may be changed and reclassified within such district, by petition, notice and hearing in the same manner as provided for changes and reclassification within Residence Districts.

(*c*) Reclassification Within Industrial Districts—Any portion of an Industrial District may be changed and reclassified within such district, by petition, notice and hearing in the same manner as provided for changes and reclassification within Residence Districts; provided, however, the decision of the Council in such case shall be expressed by ordinance, which ordinance shall be subject to the referendum.

Sec. 34. *Changing from One Kind of District to Another.*

(*a*) Any portion of a Residence District, Business District, or Industrial District may be changed and transferred from one to the other of said districts of any classification thereof by petition, notice and hearing in the same form and manner as provided for changes and reclassification within Residence Districts; provided, however, the decision of the Council shall be expressed by ordinance, which ordinance shall be subject to the referendum.

(*b*) *Changes in Height Districts.*

Any portion of a Height District may be changed and reclassified by petition, notice and hearing in the same form and manner as provided for changes and reclassification within Residence Districts; provided, however, the decision of the Council shall be expressed by ordinance, which ordinance shall be subject to the referendum.

(*c*) *Districts defined.* For the purposes of changing and redistricting any portion of a Use or Height District, as herein provided, every portion of such district which lies separate and apart from other portions thereof shall be treated as a separate district.

(*d*) *Further amendments or changes.* Any other amendments, alterations or changes in Use or Height districts, not herein provided for, shall be made by ordinance.

Sec. 35. *Official Map for Use and Height Districts.*

The City Clerk shall keep on file in his office an official map of the Use and Height Districts herein provided for, showing the character, extent and area of each respective district. In every case where the dividing line of a district or portion of a district is within

the lines of any city block, he shall indicate by figures on said official map the exact location of such district lines. He shall also indicate all alterations, amendments or changes hereafter made in any of said districts or district lines by showing thereon the new lines in a different color from the lines in which said map was originally drawn or printed, together with a proper explanatory legend giving the date of each such change and amendment. Said map shall be certified by him as being the original Zone Map of the City of Alameda.

SEC. 36. *Completion and Restoration of Existing Buildings.*

(*a*) Nothing herein contained shall require any change in the plans, construction or designated use of a building for which a building permit has been heretofore issued, or for which a permit has been applied and plans for which are on file with the building department at the time of the passage of this ordinance, and a permit for the erection of which is issued after the passage of this ordinance, and the construction of which in either case shall have been diligently prosecuted within six months of the date of such permit, and the ground story framework of which, including the second tier of beams, shall have been completed within said six months, and which entire building shall be completed according to such plans as filed within two years of the date of the passage of this ordinance.

(*b*) Nothing in this ordinance shall prevent the restoration of a building less than forty (40) per cent destroyed by fire, explosion, act of God or act of the public enemy or prevent the continuance of the use of such building or part thereof as such use existed at the time of such destruction of such building or part thereof. Nothing in this ordinance shall prevent the restoration of a wall declared unsafe by the superintendent of buildings or by a board of survey.

SEC. 37. *Individual Enactment of Sections.* It is hereby declared to be the intention of the City Council to enact each and every section, paragraph, clause or phrase of this ordinance irrespective of the enactment of every other section, paragraph, clause or phrase herein contained.

SEC. 38. *Repeal of Certain Other Ordinances.* Ordinance No. 125, N. S. entitled "An Ordinance establishing a Residence District and also an Industrial Zone in the City of Alameda and providing regulations for both" is hereby repealed, to take effect thirty (30) days after the final passage of this ordinance.

SEC. 39. *When Effective.* This ordinance shall take effect thirty (30) days after its final passage.

SEC. 40. *Printing for Distribution.* The City Clerk shall cause one thousand copies of this ordinance to be printed for distribution.

PART V

CITY PLANNING FINANCE

Importance of Financial Considerations.—One of the essential parts of the planning of the public features of a city is the devising of methods of financing their construction. The problem of raising sufficient money to build the public works necessary to the prosperity and well-being of the modern city is a difficult one and this difficulty is constantly increasing. In the earlier period of our municipal history, the authorities were expected to do little more than keep the peace, leaving it to the citizens themselves to obtain most of the facilities of city life. Nowadays these facilities have greatly increased in number and cost, and the citizen looks more and more to the city authorities to furnish them. In comparatively recent times the city dweller obtained daylight, air, and outdoor recreation from his own land or that of his neighbors; now he demands boulevards, parks, playgrounds and recreation fields supplied by the city. Formerly, to go to and from his business, he was satisfied with the leisurely horse car line, built and managed at comparatively small expense by private enterprise; he obtained water from his own well or a private company, and at night burned a kerosene lamp; now he demands a subway express, electricity, public water in superabundance, and the countless necessities and luxuries that have come to be considered public utilities; and if private enterprise does not supply these needs at a minimum price, he clamors for, and obtains the use of, public money for the purpose. These changed conditions have greatly increased the amount of money that the modern city must raise from its citizens, and made the distribution of the heavy burden a matter of grave concern.

Sources of Municipal Revenue.—There are three main sources from which the modern city obtains its revenue:

municipal property and enterprises, subventions from the central government and general taxation. In addition, special or local benefit assessments are levied, the proceeds to be used only in improving the property assessed. Taxation, everywhere, is the principal source of general revenue. In Europe, especially in Germany, municipal property and undertakings yield a much greater proportion of the whole than with us, and subventions, so rare here, are common. Local or benefit assessment is resorted to more in this country than abroad. Municipal taxation in Germany is levied principally on incomes from all sources, and in England, until recently, local taxes on real estate were assessed exclusively on its rental values; so that unused land, in these countries, was not taxed. There is now in Germany and there was in England for a few years [1] a small special tax on unused realty. In this country the common form of local taxation, the proceeds of which are available for any municipal purpose, is the general property tax, levied at the same rate on all property real and personal, but in practice personal property, so easily concealed in most of its forms, escapes taxation to a considerable extent, so that, with us, perhaps 75 per cent of municipal taxation falls upon real estate. In some jurisdictions by law, and in others in practice, unused land, and land used for agriculture, within city limits, is taxed at a much lower rate than other realty in the city. The incidence of taxation affects the relative values of property, the uses to which it can be put with profit, and, in this way, the city plan. Thus, for instance, if unused realty or real estate used for agriculture is not taxed, or is assessed at a much lower rate than other land, it will more often be held for a speculative advance.

General Taxation.—The constitutions or laws of many of the states in this country require that, in levying the general property tax, a uniform rate shall be fixed for all sorts of property. The determination of the rate from year to year is usually left to the city authorities. In this country, in order to guard against too heavy taxation, the constitution or law of the

[1] "Undeveloped Land Duty." This, and an "Increment Value Duty" were both imposed under the "Finance (1909-10) Act, 1910" (10 Edw. 7, ch. 8).

state or charter of the city usually fixes the maximum amount, or the maximum rate, of the tax; while in Europe the rate and amount of the various taxes, in so far as locally determined, is usually subject to readjustment by the state or national authorities. Some check upon the amount that a city can raise by taxation in a given period is generally regarded as necessary, but the fixing of the proper maximum is a difficult matter. An unduly high rate of taxation makes both living and business expenses excessive; but too low a rate, making it impossible for the city to furnish the streets, docks, public utilities and other necessities and aids to healthful and contented living, the prosperous conduct of private business and the normal growth of the city upon which business and therefore comfortable living conditions are dependent, is equally unfortunate. The fixing of a maximum rate to be applied under all circumstances to all the cities of a state is, as compared with the European method of regulation, a crude way of settling intricate questions; such a maximum, if too high, is of no effect, and if too low, is disastrous. We have not in this country developed the administrative machinery for the use of the European method, nor indeed have we come to believe that we should adopt it. If, under these circumstances, we impose a maximum, it should be a liberal one. The risk of the possible abuse of a necessary power is never a sufficient reason for limiting it to such an extent as to make its proper use impossible.

Municipal Borrowing.—It is not wise in all cases to adopt the policy of limiting the expenditures of the year to the amount that can safely be raised by taxation during that year. Such a policy would make it impossible to construct needed improvements and would often deprive the city and its citizens of necessary facilities and even result in financial loss. Where an improvement is permanent or will remain useful for many years, the sum needed should be borrowed, to be repaid gradually. This is just; the future receives its share of the benefit and should pay its share of the cost. It is also expedient; the improvement will, in well-being or financial gain, return year by year more than interest and amortization charges on its cost;

the present cannot pay for all the permanent improvements that ought to be constructed, and will leave them unbuilt rather than shoulder the burden. The correct principle in improvements of this sort is that the indebtedness incurred shall be funded, but in every case provision, by sinking fund or otherwise, should be made for the payment of the loan during the period of the usefulness of the work.

The Debt Limit.—The risk of excessive borrowing is more insidious and therefore much greater than that of excessive taxation. In Europe this danger is guarded against by state or national supervision and control of municipal loans. In this country, to attain this end, the state by constitutional provision or statute imposes a debt limit upon cities. In most cities in the United States there is a general limit, varying all the way from one and one-half to ten per cent. of the assessed valuation of real estate within the city; but, without regard to this limit, indebtedness may be contracted for many purposes, and there are easy methods of increasing the percentage. Probably there are few cities where the total indebtedness may not exceed five per cent. of the assessed valuation, and many where it may materially exceed ten per cent.[2]

In the effort to prevent extravagance and dishonesty, care must be taken that the debt limit, like the tax limit, is not fixed at too low a rate. In municipal as well as in private business an extensive plant and equipment are becoming more and more essential to economy and efficiency; and municipalities, like other corporations, can obtain the money for such uses only by borrowing for the purpose. The power to borrow adequately, like the power to impose adequate taxes, although undoubtedly subject to abuse, is essential to the conduct of the affairs of the modern city. The democratic remedy for the possible abuse of needful powers is not to abolish or unduly curtail them, but by active participation in government to secure their proper use. Faulty as it is, democracy is the best form of government we know, and local self government, with the necessary powers to make it effective, is essential to it.

[2]For a fuller statement on this point see *"City Planning,"* edited by John Nolen, p. 391.

Not all loans are obtained for the purpose of making durable improvements. In every city it is customary to borrow for the purpose of meeting certain current expenses that will later be taken care of in other ways. If this is not done, delays in construction are likely to occur, most expensive to the city and to land owners. This is especially true with relation to the laying out of streets, with their sewers and other accessories needed for building development. Without them houses cannot be erected on abutting land, the owners must carry it at a heavy expense instead of selling it at a profit, and the city must lose several years' taxes on improvements not yet built. The entire cost to the city of this construction may and should be a charge on the property improved, to be speedily repaid by the land owner. Certainly such a lien is a safe and ample security for such a loan. Not only should the city be allowed to borrow for such purposes, but the loans should be outside the debt limit.

Self-Supporting Enterprises.—Self-supporting public enterprises should also be outside the debt limit. As soon as, for instance, a municipal street railway or gas plant is on such a basis as permanently to be able to pay interest on the cost and a reasonable sum toward amortization and renewals, the money thus employed should no longer be regarded as a debt but recognized as an investment, and the amount so employed deducted in calculating the indebtedness under the debt limit.[3]

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[3] Such loans are as a rule outside the debt limit in Canada. See for instance R. S. Manitoba 1913, Municipal Institutions (ch. 133), part VIII, Local Improvements, sec. 561; Saskatchewan Stat., 1915, ch. 16; 1916, ch. 19. Indebtedness to acquire self-sustaining enterprises is also, to some extent, outside the debt limit of the city and county of Philadelphia (Penn. Const., art. IX, sec. 8) and of Virginia cities (Va. Const., art. VIII, sec. 127).

The city that perhaps has found such a law most useful is New York. The provision is in the constitution of the State and is as follows:

Art. VIII, sec. 10: . . . "Any debt hereafter incurred by the City of New York for a public improvement owned or to be owned by the city, which yields to the city current net revenue, after making any necessary allowance for repairs and maintenance for which the city is liable, in excess of the interest on said debt and of the annual installments necessary for its amortization, may be excluded in ascertaining the power of said city to become otherwise indebted, provided that a sinking fund for its amortization shall have been established and maintained and that the indebtedness shall not be so excluded during any period of time when the revenue aforesaid shall not be sufficient to equal the said interest and amortization installments, and except further that any indebtedness here-

Avoiding the Debt Limit.—After the city has reached its debt limit, it may still make improvements or acquire property if only it does not enter into any obligation to pay for them. This it may accomplish by constituting these payments a charge on a special fund to be created or on special property to be acquired. Thus the city may construct a public work to be paid for solely by local assessments on private property benefited, the assessments usually being a lien on this property;[4] or make extensions of a public utility, the cost to be paid solely out of net income;[5] or, if it can make whatever initial payment may be required out of current income, it may accept property subject to a mortgage which it does not assume,[6] or acquire property to be paid for, if at all, in installments.[7] In the two latter cases, the city will lose the property if the mortgage or the installments are not paid when due, but in no case is it under any obligation to meet them. In all these cases the city, by pledging its credit, could accomplish its purpose more cheaply; but if the improvement is needed at once it may be

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tofore incurred by the City of New York for any rapid transit or dock investment may be so excluded proportionately to the extent to which the current net revenue received by said city therefrom shall meet the interest and amortization installments thereof, provided that any increase in the debt incurring power of the City of New York which shall result from the exclusion of debts heretofore incurred shall be available only for the acquisition or construction of properties to be used for rapid transit or dock purposes. The legislature shall prescribe the method by which and the terms and conditions under which the amount of any debt to be so excluded shall be determined, and no such debt shall be excluded except in accordance with the determination so prescribed. The legislature may in its discretion confer appropriate jurisdiction on the appellate division of the Supreme Court in the first judicial department for the purpose of determining the amount of any debt to be so excluded. No indebtedness of a city valid at the time of its inception shall hereafter become invalid by reason of the operation of any of the provisions of this Section. . . ."

The legislature did pass an act (Laws, 1910, ch. 276) so prescribing methods, and giving the Court referred to, jurisdiction. For a case construing this paragraph and law see In re Debt Limit, 123 N. Y. Supp. 860.

[4] Kelly v. Minnesota, 63 Minn. 125 (1895).

[5] Winston v. Spokane, 12 Wash. 524 (1895); Lexington v. Lafayette Bank, 165 Mo. 671 (1901); Evans v. Holman, 244 Ill. 596 (1910).

[6] Burnham v. Wilwaukee, 98 Wis. 128 (1897); *contra,* Browne v. Boston, 179 Mass. 321 (1901); Evans v. Holman, 244 Ills. 596 (1910).

[7] Cases cited above; *contra,* Reynolds v. Waterville, 92 Maine, 292 (1898). See generally on this subject, Pond, *Public Utilities,* ch. VI (Bobbs-Merrill Co., Indianapolis, 1913).

worth the added expenditure necessary to obtain it without delay.

Special Assessments.[8]—The planning and construction of streets and other public features are undoubtedly of advantage to the entire city. In many jurisdictions the cost of such features is met by a tax on the city as a whole. But the land in the neighborhood of an improvement, in addition to the general gain, often receives a special benefit by reason of this construction. This result of public works wisely planned and intelligently carried out is perhaps most evident in the case of land abutting on a newly built street. This land, in addition to the privileges in the street which it shares with all city land, receives special benefits from it, such as the right to light, air, access and view, which greatly and immediately raise its market value. The law and custom of all civilized countries respects these privileges; our law recognizes them as property rights in the street appurtenant to and running with the abutting land of which the owner cannot be deprived without compensation.[9]

It is becoming more and more the rule, the world over, to make a special assessment against this land to meet the cost of the street. The justice and expediency of this course is evident. General taxation is imposed upon all because it is for the benefit of all. To the extent that a new street or other improvement is of special advantage to neighboring property owners, it is unfair to assess its cost upon the property owners of the city as a whole; and it is only right and just that to this extent the neighboring land owners should pay for the gain they receive. Any other course would enrich them at the general expense. Care, however, should be taken not to levy a local tax in excess

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[8] Also called local or benefit assessments. Such an assessment has been defined as "a compulsory contribution paid once for all to defray the cost of a special improvement to property undertaken in the public interest and repaid to the government in proportion to the special benefits accruing to the property named." (*Quarterly Journal of Economics*, April, 1893). There are many other sorts of assessment, such as the imposition on the owner of realty of the cost of cleaning the sidewalk of ice and snow, or of repairing the pavement in front of his land, or the levying on him of the price of water supplied, etc., etc. It is not, however, any of these, but only special or benefit assessments that are here considered.

[9] For a fuller statement of the law on this subject see p. 173.

of the local gain. The improvement of a residential street for through travel might often prove to be a detriment to the abutter.

The history of benefit assessment is a long one. In Europe the practice goes back at least to the feudal period, but it is only in comparatively recent times that it has begun to come into common use in European countries. Thus in England local statutes authorizing its use began to be passed about 1900 and now this procedure is authorized as a part of the general "Housing, Town Planning, etc., Act" passed in 1909. In France local assessment to provide payment for various public works was authorized as a part of a general statute passed in 1807, but the procedure was so cumbrous that this method of financing improvements has not been employed in France until very recently.[10] In Germany for many years there have been provisions for local assessments in the laws of the different states. In this country the practice, copied from the custom and law of London, was introduced in early colonial times, but the period of its active use did not begin until about 1813; and it is now the prevailing system here and in Canada.

Limiting the Amount of Local Assessments.—Local assessment is based upon the principle that the land owner should repay the special benefit he derives from a public work.[11] In some cities in this country only a certain proportion of the cost of a new street, or its cost only to the extent of a certain proportion of the special benefit it brings to abutters, is collected from them. This latter practice is contrary to the principle of local assessment. It is unjust that the abutter should pay more than the amount of his peculiar gain, but he should certainly pay to the extent of that gain or the other tax payers

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[10] See the report accompanying the bill to amend the expropriation law of May 3, 1841, Chamber of Deputies, 10th Legislature, extraordinary session of 1911, No. 1369.

[11] In some states it is held that the question whether such an assessment is in any particular case in excess of the special benefit, is for the courts; in others that the decision of the administrative authorities on that point cannot as a rule be so reviewed. See for a fuller discussion of this point, Page and Jones, *Taxation by Assessment* (1909), sec. 666 and ff.

will be compelled to pay for a portion of the benefit which he has received.

Another method of limiting the amount of the betterment tax is to provide that it shall in no case exceed a certain percentage—often fifty per cent.—of the market value of the land and buildings, or of the land alone, upon which it is levied. The hardship which this limitation seeks to obviate is evident. Unlike ordinary taxation, a special assessment occurs at irregular intervals and may bear any ratio, however great, to the value of the property on which it is assessed. The assessment must also be met promptly; if this is not done mortgagees will foreclose, or the city will soon place a lien on the property and sell it. For these reasons, in spite of the fact that a local assessment is merely a payment for value received, land owners are often compelled to make severe sacrifices to meet it, and sometimes, unable to do so, have lost their property.

Payment of Assessment in Installments.—There are various methods of preventing the hardship just indicated which do not involve limiting the assessment to less than the amount of the betterment. The method adopted in this country to accomplish this result is to provide that if the assessment exceeds some moderate percentage, such as ten, five, or even three per cent, of the value of the property, it may be paid in installments; and in order that the city, which has advanced the money necessary to pay the full cost of the improvement, may not suffer, interest is payable to the city on all unpaid balances. Such statutes are now common in the United States.

Payment of Local Benefits in Germany.—In the German states the abutter is liable for the cost, with sewers, lighting system, etc., and in Prussia and some other states for five years maintenance, of half that portion of a new street of ordinary width on which he abuts; or of the equivalent area of a wider street; but is obliged to pay this amount, without interest, only when he builds on his lands. The street may be constructed by the city or by any owner of land on the street. If the land owner lays the street out, he, as the "undertaker" of the enterprise, can recover the cost, without interest, from the other land owners when they build, just as the city has the

right to do when it is the "undertaker." This system enables the land owner to postpone the payment for the benefit to his land from the improvement until that benefit has been actually received; whereas our system sometimes compels him to pay for expectations which, however well founded, are sometimes hard to convert into the immediate cash needed to pay the assessment.

In practice the system in vogue here tends to hasten the development of land, while the German system tends to retard it. The German authorities hesitate to build streets far in advance of the immediate and certain need of building lots, since this might throw upon them not only the maintenance charges of improvements not fully utilized but also the interest on the cost of construction for many years. It is because of this unwillingness of the authorities to construct streets that the private land owner often does so at his own risk; for otherwise he is unable for some time to utilize or market his land. The risks and expenses which the authorities thus escape are not, however, an economic saving; they are ultimately paid for by the public in increased prices for building land and higher rents. The speculator incurs these expenses only in the hope, often fulfilled, of adding them, with a handsome profit, to the selling price of his building lots.

Land development is also retarded in Germany—as in European countries generally—by the fact that the owner pays taxes not on its capital value, as with us, but only on its income. Under this system unused land can be carried at a small expense, while here the cost is heavy.

One of the usual effects of the German legal system of street construction and of taxation of land is to decrease the amount of improved building land, and to produce a city solidly built up to the point where the open fields begin. The German authorities point out the fact that this method of city building saves the expense of vast stretches of little used streets, sewers, and public utility systems, as well as the policing of sparsely settled districts, necessary under our system. It is evident, however, that this German system of solid city building tends to limit the available supply of "building ripe" land to a nar-

row belt around the city. In so far as this lessens the extent to which vacant land is held speculatively for sale as building lots, it lessens carrying charges and the price of building land to the purchaser. The German land reformers point out, however, that the system also limits the supply of building land to that contained in this narrow band and thus raises prices, while under our system all the land suitable for building within a reasonable distance of the city is available for the purpose.[12]

In Prussia the land owner has no right under any circumstances to demand that the city build streets; but in some of the other states he may require this to be done when there is a public necessity for the street; the law usually providing that when the solidly built city or its advance guard of structures has approached within a given distance, varying in the different states, from the land in question, the street shall be constructed. The legal system of street construction and the practice which has grown up under it, with their manifold effects on city construction, must be studied in detail in order to understand city planning in Germany; and they may not be without suggestions or warning from which we may profit. It is all an integral part of the great problem of the wise control of the distribution of population and industry with relation to land and the other natural resources of the state and nation, the solution of which is essential to a decision in this and so many other of its numerous phases.

Area of Assessment.—Experience has shown that in the construction of new streets of usual or standard width the abutters as a general thing are benefited by the increase in the market value of their land at least to the extent of the cost; and it is now common practice in this country and not unusual abroad to collect the entire cost of such streets from the abutters. Where, however, a street of greater width is laid out, the abutter is not often specially benefited by the extra width to anything like the extent of the extra cost it entails; but in such cases there is a district on each side of the street beyond the land of abutters, perhaps on other standard streets, which feels the good effect of a street of more than ordinary impor-

[12] See also pp. 40, 455.

tance. Here is a special benefit that in justice to the city as a whole should be specially taxed, and in the United States and Canada it is not uncommon nowadays to do so, an area of assessment being created for that purpose.[13] This course may be followed under any law allowing the assessment of local benefits which does not limit the assessment to abutting land. In cities where it is customary to collect local benefits from all who are so benefited, whether they are abutters or not, it is only the exceptional street, with its sewers and other accessories, any part of the expense of which is paid by the city as a whole.[14]

In New York and a few very large cities a special benefit to a portion of the entire city is recognized in the case of improvements of more than local, but not of city-wide, effect. In New York, for instance, the assessment in such cases, so far as not levied on abutters, or a more limited area, is often made on the borough in which the improvement is undertaken.[15] In

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[13] The reader will perceive that the German practice is governed by a "rule of thumb" which to some extent produces this result.

[14] Such an apportionment is legal. Page and Jones, *Taxation by Assessment*, sec. 663 and ff. (1909).

[15] The provision for the purpose, sec. 247 of the charter, is as follows:

247. *Board of estimate and apportionment; power with respect to certain public improvements.* Before a public improvement of any kind (except an improvement to be made pursuant to the rapid transit act) involving the acquisition or the physical improvement of property for streets, public places, parks, bridges, approaches to bridges, for the disposal and treatment of sewage or the improvement of the waterfront, or involving both such acquisition and physical improvement of property, which acquisition or physical improvement, or both, is estimated to cost the sum of fifty thousand dollars or more, shall be authorized, the board of estimate and apportionment may determine in what manner and in what shares and proportions the cost and expense of the acquisition or physical improvement, or both, shall be paid by the city of New York, by one or more boroughs thereof, by a part or portion of one or more boroughs thereof, or by the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements, hereditaments and premises not required for the said improvement, which said board shall deem peculiarly benefited thereby.

"If said board shall determine that the cost of such acquisition or physical improvement, or both, shall be apportioned between or among the city of New York, one or more boroughs thereof, a part or portion of one or more boroughs thereof, or the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements, hereditaments and premises not required for the said improvement, which said board shall deem peculiarly benefited thereby, the said board may also determine in what manner and in what proportion the cost and expense of such acquisition or physical improvement, or both, shall be

some smaller cities the local effect of all improvements is recognized by dividing the city into tax districts for all, or certain, purposes.

In England the Planning Act of 1909 and 1919, under which special areas are chosen for development, provides that the local authority responsible for any given town planning scheme may levy local benefit assessments, and, moreover, appropriate fifty per cent of any and all increases in net values of real estate due to the plan. It was evidently considered wiser to allow private owners to retain half of these gains, so as to get and keep their interest in the inauguration and execution of the plan.

Assessments for Parks.—The principle of assessment of special benefit taxes may be applied not only to streets but to parks. In this way, it has been found, the whole cost of small parks and playgrounds, and some part in every case of the cost of large parks, may be paid. This method of obtaining parks prevails and receives popular support in New York and many other cities. A most remarkable example of this policy is furnished by Kansas City. The city is divided into six park districts. Practically the entire expense of parks within the city is paid by these districts, the expense being assessed upon abutters and others specially benefited in proportion to their benefits. Thus, virtually without cost to the city as a whole, an entire park system, extensive and beautiful, has been built up; and, more wonderful still, land owners compete with one another to secure parks for which they themselves must pay.[16]

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borne either by the city of New York, by one or more boroughs thereof, by a part or portion of one or more boroughs thereof, or by the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements, hereditaments and premises not required for the said improvement, which said board shall deem peculiarly benefited thereby. . . ."

[16] These facts are obtained from the report of the Board of Park Commissioners for Kansas City for 1910. With regard to them the report says (p. 6):

"The figures given in the accompanying report are not estimates or guess work, but actual facts, which would be competent evidence before any court of record that the enhancement of values in real estate directly attributable to the influence of the park and boulevard system is far in excess of the entire cost of that system to the property owner who has paid for it, and that it has been for him a highly profitable invest-

The results of the establishment and extension of the parks in Essex County, New Jersey, are perhaps even more striking. The commissioners claim, and cite the facts and figures of a careful investigation to prove, that the park land has increased in value over five hundred per cent, adjoining land over six hundred per cent and other land within the park influence, over two hundred per cent, in twelve years.[17]

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ment. The complete understanding and appreciation of this fact is demonstrated by the constant pressure brought upon the Board of Park Commissioners by weekly delegations of property owners arguing for the extension of park and boulevard improvements into hitherto undeveloped and unimproved sections of the city, and into the new territory acquired by the extension of the city limits, in order that the advantages of the extension of its system and the enhancement and permanency of real estate values which it invariably gives to the neighboring property may be enjoyed in equal proportion by the residents of every section of the city."

For facts and figures in more detail, see pp. 12, 13 of this report.

[17] The facts just stated are a brief summary of the following statement, contained in a letter, written to the author by the secretary of the Essex County Park Commission: "The Essex County Park Commission has recently made an investigation as to the relative increase in property valuation in the neighborhood of the four county parks in the city, and that of other property in the same taxing district just outside of what may be called the 'park influence.' The object was to ascertain how much the development of a park adds to the value of the adjoining property beyond that of other neighborhoods not affected by park improvement. The investigation was made by Tax Commissioner John Howe, whose fitness for the work is acknowledged. A report was made upon each park as the figures were ascertained, and the statistics, except those relating to Branch Brook Park, have been published in the *Sunday Call*. These four parks are Eastside, Westside, Weequahic and Branch Brook.

"The reports show that the parks themselves have increased in value from $1,000,000 to more than $5,000,000, but this increase of $4,000,000 is not emphasized, as it is not available for taxing purposes. The property immediately adjoining the four parks named was assessed in 1905 for $4,143,850, and in 1916 for $29,266,000, an increase of $25,122,150, or 606.3 per cent. At the same time property in the same taxing district and perhaps not wholly outside of what may be called the 'park influence' was assessed in 1905 at $36,606,907, and in 1916 at $111,531,725, a gain of $74,924,818, or 204.6 per cent. In plainer words, while the property adjoining the parks had increased more than six times in value, property in the remainder of the same taxing districts has about doubled in value.

"If the increase in valuations adjoining these parks had been the same as in other property in the same taxing districts, and no more, it would have been $8,453,454, leaving an increase as a result of the parks of $16,668,700. The fortunate owners of this property have been enriched by this large sum beyond what they would have been had the parks not been established.

"But this is not all. The cost of these four parks was $4,241,540. The increase is enough to pay for them four times. The cost of all the parks in the county was $6,929,625.47—say $7,000,000. The increase of property adjoining these four parks alone, beyond what it would have been if the parks had not been constructed, is sufficient to pay for all

Additional facts and figures of this sort might be given indefinitely, but there can be no proof to a mathematical certainty that new parks increase land values in their neighborhood, since other factors in these increases cannot be incontrovertibly eliminated or exactly allowed for. Manifestly, however, the judgment of common observation and common sense strengthens the conclusion that new parks, if wisely planned and located, are sufficient to add greatly to land value; and fortunately our courts do not demand any better evidence.

Assessments for Public Improvements Generally.—There is no reason why the practice of levying local assessments for local benefits should be confined to streets and parks. On the contrary, as has been well said,[18]

"One principle should be invariably recognized, namely, where there is local benefit there should be local assessment. There can be no improvement which has been intelligently planned and executed which will not result in some local benefit, and it follows that there always should be some local assessment. No improvement, however small or however large, will be of equal benefit to the entire city, and to distribute the burden of paying for it over the whole city according to taxable values is unfair in that it is not placed according to benefit." [19]

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the parks in the county 2.4 times, and the increase from the other parks in the county, while not so great in proportion, is undoubtedly much more than their cost. The increased revenue to the county is already sufficient to pay the interest and sinking fund charges on the bonds issued for park construction.

"So the county is the possessor of what is said to be the finest system of parks in the country, and they have paid for themselves and will remain an asset that will not only yield a dividend in taxes to the county, but one in health and pleasure to the people that is beyond price."

[18] Nelson P. Lewis, Chief Engineer of Board of Estimate and Apportionment, New York City, in Proceedings of Fourth National Conference on City Planning, p. 45.

[19] An assessment may be levied for the benefit derived from several correlated improvements, and for the benefit obtained by the several elements of a scheme or plan of development or improvement. Thus an assessment on the property benefited may be made for a new or improved highway with sewers and building lines (Laws, New York, 1869, ch. 861; Lincoln v. St. Com'rs., 176 Mass. 210 (1900), or for the improvement of a district by the widening of certain highways, the narrowing of others, the establishment of building lines on some of them and the exclusion of certain trades and industries in others (Laws, New York 1868, ch. 631) or for the construction of a train station, and the construction and change of streets so as to give access to it. (Sears v. St. Com'rs., 180 Mass. 274 (1902); Wells v. St. Com'rs., 187 Mass. 451 (1905). See also, American Assoc. v. Commonwealth, 193 Mass. 470 (1907).

Assessments for Transit Lines.—An application of this principle, most useful, most just, and yet quite outside ordinary present practice in the United States,[20] is the assessment on those locally benefited of the cost of the construction of local transit lines. In this connection the article just quoted states: [21]

"The City Club of New York several years ago showed that as a result of the building of the first Rapid Transit Subway in New York the actual land values in those portions of upper Manhattan and the Bronx which were most directly affected were within seven years increased $80,500,000 above the normal increase for that period. The cost of that part of the subway passing through the districts where this rise in values took place was about $13,000,000, while the cost of the entire subway from the Battery north was $43,000,000. It is quite evident that if the $13,000,000 which was spent upon that part of the subway traversing the district so notably benefited had been assessed directly upon the property, its owners would still have netted a neat profit of some $67,500,000, while had the cost of the entire subway been assessed upon the same limited district, the net profit to the land owners would have been $37,500,000. Was it quite fair that property in distant parts of the city, entirely unaffected by this great project, should bear the same proportion of the burden as that which was so conspicuously advantaged?" [22]

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[20] In Canada, very generally, the cost of constructing or extending public utilities or of acquiring them if already constructed, may be defrayed by the levy of local assessments upon those benefited in proportion to their benefits. Saskatchewan, Stats., 1916, ch. 19, part XII; Revised Statutes, Ontario, 1914, Local Improvements, ch. 193; Revised Statutes, Manitoba, 1913, ch. 133, sec. 483.

[21] Proceedings of the Fourth National Conference on City Planning, p. 43 at 46.

[22] The report of the City Club, here referred to, is also mentioned with approval by the Federal Electric Railways Commission in its report to the President, published by the Government Printing Office, August, 1920. See also an article entitled "Low Street Railway Fares With the Help of the Land Owner," by Louis B. Wehle, in the *National Municipal Review* for October, 1921.

The following legal provisions for the construction of a rapid transit road in the manner described in the City Club's report are on the statute books of New York State, but have never been made use of:—

New York Laws 1909, amending (by sec. 17) laws 1891, ch. 4, as heretofore amended by adding thereto sec. 37, pars. 3-9; here given as amended by Laws 1915, ch. 545, applying to cities of over a million inhabitants—i.e., New York City.

Rapid transit railroad owned by city to be local improvement.

3. . . . A rapid transit railroad, owned or to be owned by the city, and for the construction of which with public money in whole or in part a contract or contracts have been or are authorized by this act to be entered into as aforesaid, shall be a local improvement, the cost of which railroad may be met in whole or in part by assessment on the property benefited. The public service commission with the approval of the board

Increment Taxation.—It has often been urged of late that there should be a special tax on increments in land value,

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of estimate and apportionment . . . shall have power to determine whether all or any, and if any, what portion of the cost and expense necessary to be incurred for any such road shall be assessed upon property benefited thereby, and whether all or any, and if any, what portion of the cost and expense necessary to be incurred, or which shall have been already necessarily incurred, for the acquisition of any property for the construction or operation of said railroad shall be assessed upon property benefited by said railroad. An assessment or assessments upon the property so benefited may be laid, confirmed, enforced and collected in accordance with such determination and pursuant to the provisions of the charter and laws respecting assessments for local improvements in such city.

Assessments; determination of property benefited, collection.

*4-6. Procedure, etc., in levying such assessments.

7. In order to provide funds in advance of the collection of such assessments, the comptroller or other chief financial officer of such city shall in addition to power to issue assessment bonds under the provisions of any law or charter of such city have also additional authority in lieu of issuing any such assessment bonds under said law or charter to issue and sell at not less than par on or after the date when any such assessment shall be confirmed and entered bonds which shall be known as rapid transit construction bonds for the railroad designated as aforesaid and which shall not exceed in the aggregate the amount of the assessment so levied as aforesaid. Except that the city may guarantee in such bonds the validity of the assessment and the regularity of the proceedings to levy it, such rapid transit construction bonds shall not be issued or sold upon the faith or credit of the city and the faith or credit of the city shall not be pledged nor shall the city or any of the city's property be liable for the payment thereof, but such bonds shall be payable only out of the rapid transit construction fund as hereinafter directed to be constituted. Such bonds shall be in such form, denomination or denominations, and for such term, not exceeding fifteen years, as the said comptroller or other financial officer shall designate, and shall bear the same rate of interest as the assessment installments shall bear. . . .

Issue and sale of rapid transit construction bonds.

City's faith and credit not pledged.

Bonds; form, interest, exemption from taxation, etc.

"In selling such rapid transit construction bonds the comptroller may by the terms of sale or otherwise prescribe that payment to him therefor shall be made by the purchaser in such installments as the need of construction as certified to him by the public service commission shall require, and may provide for the forfeiture of the right to bonds allotted and of payments made thereon. All moneys derived from the sale of such bonds, and all moneys derived from the collection of such assessments shall be kept separate and apart from all other funds of the said city and shall be known as the rapid transit construction fund of such railroad. . . . They shall be applied only to the following uses and among such uses, only in the following order as nearly as may be: (1) To cost and expenses of the construction of such railroad and the acquisition of property necessary for such construction, including equipment other than rolling stock; (2) to the acquisition of real property necessary for the operation thereof; (3) to the retirement of the rapid transit construction bonds therefore. . . ."

Terms of sale.

Rapid transit construction fund.

Uses of assessments.

*8. Proceedings in cases of default on bonds, reductions in assessments; excess of cost of road over assessments, etc.

*9-10. Partial assessment of costs; procedure when funds derived from assessment are insufficient.

* Summarized.

heavy enough to appropriate for general use the major part at least of gains due to that cause. It is asserted that the rise in land values is, in the main, the result of the general improvement of the community, and its increase in numbers, and, in so far as expedient, may with justice be appropriated for general use by special taxation. It is impossible within the limits of this work to discuss the merits of such taxation; but some of its applications may with profit be considered.[23]

Germany has now for many years made use of increment taxation. As administered in that country there are certain practical objections to it. Germany makes the entire levy at the time of the sale of the real estate, appropriating at that time a substantial portion of the increment in value since the last sale. This system yields an uncertain income and often absorbs such a large percentage of the selling price as to cause hardship and prevent the free sale of land. Land is usually mortgaged, and often improved land is subject to more than one mortgage, so that the total indebtedness on it equals a large percentage of its value. If, as is said often to be the case in Germany, the increment tax takes all or more than all the equity in the property, sales are made exceedingly difficult.

The objections just stated are not inherent in increment taxation; indeed a bill free from them was introduced into the New York legislature.[24] It took the assessed value of land,

[23] The increment may in some cases be obtained for the city by excess condemnation, if legal (See p. 59 above); and in Germany these returns are sometimes secured to the municipality by the purchase of land at private sale, but cannot be condemned for that purpose.

[24] Assembly Intro. No. 1110, 1915. The bill reads (in part) as follows: "For the purpose of imposing a tax upon the unearned increment, in addition to the general tax upon real estate, the department of taxes and assessments of the city of New York shall cause to be included in the books for the annual record of the assessed valuation of real estate, kept as provided in section eight hundred and ninety-two of this act, two additional columns, in the first of which there shall be set down in each year the basic value, as hereinafter defined, of each separately assessed parcel of real estate except special franchises, and in the second there shall be set down the amount, if any, by which the assessed value of such parcel for the current year, assessed as if wholly unimproved, exceeds such basic value, which excess shall, for the purpose of this tax, be deemed the unearned increment. The basic value of any parcel of real estate shall always be the assessed valuation of such parcel, assessed as if wholly unimproved, as the same appeared on the annual record of assessed valuations of real estate on the first day of March, nineteen hundred and four-

without buildings, at the time of the passage of the act as the basic value, and provided for the levy of a small surtax each year on any excess in value which had accrued. Thus, under this proposed law, if a tract of land was assessed at $10,000 the basic year, and at $11,000 the next year, the regular tax would be levied that year on $11,000, and the surtax on $1,000; but if, a year later, the assessed value had fallen to $10,000 or less, there would be no levy of a surtax. An increment tax of this sort would furnish a comparatively steady income and would not be exceptionally burdensome.[25]

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teen; provided, however, that such basic value shall be increased from time to time by adding to the valuation as of the first day of March, nineteen hundred and fourteen, the amount of any and all assessments for public or local improvements becoming due after said date, and the reasonable cost (when incurred) of bringing the land to the established street level, of making connections for water, light and sewage and street openings when made at the expense of the owner of the parcel. In case any separately assessed parcel of real estate is divided after March one, nineteen hundred and fourteen, the board of taxes and assessments shall apportion the basic value thereof in the same manner and in the same ratio as the assessed value thereof as wholly unimproved land shall or may be apportioned under the provisions of section eight hundred and ninety-two-a of this act; and in case separate parcels shall be combined into a separately assessed parcel, appropriate combinations of the resulting basic values and unearned increments shall likewise be entered. The said unearned increment shall be taxed at the rate of one per centum per annum, and such tax shall be levied and collected and be a lien upon the real estate in the same manner as other taxes on real estate. Applications for additions to basic values shall be made to and determined by the department of taxes and assessments at the same time and in the same manner as applications for reductions of the assessments of real estate, and the determination of said department thereon shall be similarly reviewable by certiorari."

[25] The law on this subject is more fully stated by Goodnow in *Social Reform and the Constitution* (the Macmillan Co., New York, 1911), p. 274 and ff., as follows:

"IV. *Regulation by Taxation.* It has been said the modern program of social reform makes use of the power of taxation for social rather than fiscal purposes. Thus progressive rates of taxation are imposed with the idea of discouraging the accumulation of large fortunes; or taxes are imposed on land alone; while improvements on the land are exempted; or taxes are imposed on the increment of land values, not so much in the belief that larger amounts of money will be realized thereby, but in order that encouragement may be given to building, while the holding of land for rise in value may be discouraged, and in order that the congested population conditions incident to urban life may be remedied.

"Are these purposes of taxation improper, and are these various kinds of taxation unconstitutional, as depriving the taxpayer of his property without due process of law, or as denying him the equal protection of the laws? In order to answer these questions, we must have recourse to the fundamental principles of taxation, some of which are regarded

Single Tax.—Certain students, not satisfied with taking what is ordinarily regarded as increment, advocate the appropriation, in the form of taxes, of the entire income value of

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as so axiomatic that we have no provisions in the constitutions regarding them and no, or almost no, decisions exactly in point.

"One of these fundamental principles is that the courts have no control over the motives which may lead legislatures to impose taxes, provided the purpose for which the money raised and spent is a public one. Thus the legislature may impose a protective tariff if it sees fit, with the purpose of encouraging home manufacturers, or it may impose a tax with the idea of destroying the occupation subjected to the tax. The first enunciation of the principle that the power to tax is the power to destroy was made by Marshall in the celebrated case of McCulloch v. Maryland (4 Wheaton 316), where it was made one of the *rationes decidendi,* and may therefore be regarded as one of the things actually decided. Later the principle was even more clearly formulated and enunciated in Veazie Bank v. Fenno (8 Wall 533), where the power to tax was exercised for the purpose of destroying the note circulation of state banks. So, we may say, the legislative authority may resort to the power of taxation for any motive which seems to it to be proper, provided its action violates no other constitutional principle, as, e.g., that the purpose for which money raised by taxation must be public.

"In the second place, in the absence of specific constitutional restriction, the legislative authority may select for taxation such objects, classes of individuals, processes, operations, and occupations as it sees fit, and, as a corollary, may exempt such as it sees fit. The only universal constitutional principle which may be said to limit the powers of the legislature in this respect is that which provides for uniformity of taxation, or equal protection of the laws. This principle has been held, however, not in and of itself to limit seriously the power of the legislature. Thus, the Supreme Court has held that the legislative authority may provide for reasonable classification of taxable subjects, i.e., may tax railways, while exempting other corporations (Kentucky R. R. Tax cases, 115 U. S. 321); may tax corporations, while exempting other individuals (Home Ins. Co. v. New York, 134 U. S. 194); may tax the transfer of property by will, while exempting other transfers of property (Orr v. Gilman, 183 U. S. 278; Knowlton v. Moore, 178 U. S. 41); may tax sales at exchanges while exempting other sales (Nicol v. Ames, 173 U. S. 509); and so on *ad infinitum.*

"The Supreme Court has furthermore held that classification is proper where it is based on a variation of rate rather than on a variation in the subjects taxed, and that therefore progressive taxation is proper, i.e., that the rate may vary inversely or directly in accordance with some reasonable standard. The most notable example is found in the taxation of inheritances where the rate may vary inversely with the degree of relationship of the legatee to the deceased, or directly with the amount of the legacy (Magoun v. Illinois, etc., Bank, 170 U. S. 283; Knowlton v. Moore, 178 U. S. 41). . . .

"Furthermore, under the specific limitations of certain state constitutions, it is unquestionably the case that less freedom is accorded the legislature. Thus, where the constitution specifically provides for uniformity of taxation, all property except certain minor exemptions must be taxed, and progressive rates of taxation are sometimes regarded as improper.

"In the third place, the rate of taxation adopted is, in the absence of specific constitutional provisions, absolutely in the discretion of the legis-

land. They would levy all taxes on this value, and increase these taxes until the entire income was absorbed. This is the so-called single tax. A measure less radical than this is the

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lature. It is partly, at any rate, because of the existence of this principle that the power to tax is the power to destroy.

"These being the fundamental principles with regard to taxation, what is the answer we are to give to the question as to the constitutionality of the more important taxes which modern social reformers demand should be imposed? These taxes are income taxes, taxes on the unimproved value of land, taxes on the increment of land value, and, finally, taxes having progressive rates. . . .

"*Second, taxes on the unimproved value of land.*—There would seem to be no objection based upon the federal constitution to these taxes, provided that when imposed by the federal government they are apportioned among the states according to population. Inasmuch as the value of land is in large measure dependent on population, and varies almost directly with the population, a federal apportioned tax on the unimproved value of land would not work serious injustice.

"State taxes of this character might, however, be regarded as improper under the provisions of certain state constitutions, but in other states would be upheld as a result of the application of the principle according to the legislature absolute discretion in the selection of the things to be taxed (see e.g., People v. Ronner, 185 N. Y. 285, where an act of the legislature of the state of New York was upheld as constitutional which selected mortgages for taxation at a special rate).

"The same reasons which would render constitutional taxes on the unimproved value of land, would also justify the imposition of different tax rates on the land value and on the value of the improvements on the land. That is, there is no constitutional objection to either of these taxes based on the federal constitution, and none from the point of view of the state constitution in those states like New York which do not require strict uniformity in taxation.

"*Third, taxes on the increment of land value.*—What has been said with regard to the power of the federal government to impose taxes on the unimproved value of land may be repeated with regard to taxes on the increment of land value. Both taxes would be on land, both would therefore be direct, and both would have to be apportioned. It is possible that profits derived from the sale of land might be taxed as corporate profits under a federal corporation tax, without apportionment.

"When, however, we come to a consideration of the power of the states, the conditions are somewhat different. At a very early time in our history resort was had to a method of taxation which has since come to be known as assessment for local benefit. It was justified from the point of view of expediency on the theory that property specially benefited by some local improvement should be specially taxed for that improvement. It was justified from the point of view of its constitutionality on the theory that the legislature had almost unlimited discretion in the distribution of the burden of taxation, and could therefore determine that particular property should be selected for taxation for particular purposes. This, e. g., is the view of the Court of Appeals of the state of New York, in which this method originated (People v. Mayor, 4 N. Y. 419). It is also the view which was subsequently taken by the Supreme Court of the United States (French v. Barber Asphalt Paving Co., 181 U. S. 324). It is not, however, the view approved by the courts of most of the states, which have claimed the right to review the determination

"untaxing of buildings," as it has sometimes been designated. This policy calls for the taking of all taxes off improvements on land, and its imposition on the land value alone. This measure is advocated by some as a first step toward single tax, and by others as a method of checking speculation in land and stimulating the building of houses on vacant land, thus lowering rents and lessening congestion; while its opponents claim not only that it is bad finance but that the tax on land is not shifted and does not raise rents, and that the more intensive use of city land, if it resulted from such a measure, would mean an increase of land overcrowding and congestion. Several

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of the legislature that particular property was benefited by particular improvements.

"In states, therefore, where a strict uniformity in property taxation is required, an increment of land value tax which did not provide for the expenditure of the proceeds of the tax in such a way as, in the opinion of the court, to benefit the land whose increment of value was taxed, might conceivably be regarded as either violating the principle of uniformity, if considered as a tax pure and simple, or as not benefiting the property, if considered as an assessment for local benefit.

"But from the point of view of the federal constitution, there would apparently be no objection to such a tax. In states having a liberal constitution, like that of New York, it would be upheld as a tax pure and simple, and if the proceeds of the tax were devoted to undertakings which could be shown to benefit the property taxed, it could be upheld in other states as a local assessment.

"It would seem, therefore, that everywhere throughout the country, a tax on the increment of land value in a city would be proper if the proceeds of the tax were placed in a fund from which improvements shown to benefit the whole city should be paid for, particularly if the tax were low. For, under these conditions, it would not be said in a particular case that the tax imposed exceeded the benefit conferred, which might be presumed from the actual increment of value of the land upon which the tax was imposed.

"In states like New York, where it could be justified as a tax pure and simple, the rate might be made much higher, for it would not be so necessary to show a direct relation between the increment of value and the benefit.

"*Fourth, progressive taxation.*—There is no constitutional objection imposed by the federal constitution to progressive taxation. The provision that duties, imposts, and excises shall be uniform throughout the United States has been held by the Supreme Court to require merely geographical uniformity (Knowlton v. Moore, 178 U. S. 41), and progressive inheritance taxation has been upheld, although it must be admitted that the court has intimated that the progression might be so excessive, or be dependent upon such unreasonable conditions, as to be improper. . . ."

The Supreme Court of the United States has also decided that the federal constitution imposes no obstacle to progressive taxation by states, provided that the classification upon which the progression is based is reasonable.

cities have adopted this policy of freeing improvements partly or wholly from taxation, but its expediency and effect are still in dispute.

The need of the discovery and application of equitable methods of increasing the revenue of modern cities is great; the opportunities of municipalities for usefulness are constantly and rapidly increasing. The communities that do not meet these responsibilities are soon left behind in the race. The burdens upon municipalities are also increasing with the same rapidity, and municipal assets are lagging far behind. The solution of the problem of municipal finance is therefore essential not only to the proper planning and construction of cities, but to their well-being and very life.

PART VI

PLANNING FOR THE PROMOTION OF BEAUTY

The Function of Beauty.—The function of beauty is to give pleasure. Pleasure is an essential element in human life; not only is recreation a necessary relief from labor, but for high achievement there must be joy in the work performed. The enjoyment of beauty is the highest form of pleasure of which human beings are capable; no age in the world's history, no country in the world, which has failed to realize this, has been truly great.

If beauty is to be an integral part of our existence, it should be reflected in every possible phase of our daily environment. The city dweller needs a city the outward aspect of which interests and stimulates him as he goes to and from his work, and soothes and delights him in his hours of leisure. A city built economically and efficiently for residence, business and industry may be pleasing to the eye. There is a beauty in construction fitted to the purposes which it is to fulfill, where ornament is not an excrescence or an afterthought but an essential part of the structure of the individual building or the city as a whole. Beauty is harmony, proportion,—above all, fitness. The object of all vital art is "either to state a true thing or to adorn a serviceable one." [1]

Promotion of Beauty a Public Purpose.—In all the civilized countries of the world the promotion of beauty, in this sense of the word, is a public purpose. To this end these countries at public expense create national and state departments of art or impose the duties appropriate to such agencies upon other departments; maintain art schools; teach art in the public schools; found art museums and open them, free of charge, to

[1] Ruskin, *Lectures on Art, No. 4, The Relation of Art to Use.*

the public; beautify public buildings; adorn public streets and parks with monuments and statues; build scenic highways; and raise the money for these purposes by public taxation. Unquestionably public moneys can be spent and the power of public taxation used only for public purposes; and everywhere the validity of these transactions is unchallenged.[2]

Eminent Domain to Promote Beauty.—Eminent domain is another governmental power which may be employed to promote beauty. Except in the United States the validity of the exercise of this power for this purpose is unquestioned;[3] but in this country, although there were no decisions of our courts to that effect, it was formerly the prevailing belief that it could not be used.[4] It was clearly settled in law that if utility was a purpose to be attained by a measure, beauty might be an additional purpose and even the real motive which led to its enactment; but the courts can inquire only into legislative acts.[5] In accordance with this doctrine, trees, healthful and pleasant, as

[2] The promotion of beauty is expressly recognized in New York State as a public purpose; see New York, "Municipal Empowering Act" L. 1913, ch. 247, sec. 21; being General City Law, art. 11-A, sec. 21.

[3] It is often difficult to prove by the text of statutes or by judicial decisions, the legality of practices which are generally accepted without challenge. It may be pointed out, however, that in all countries which attempt to protect and preserve private property for its beauty, the power of eminent domain may be used as a last resort (see p. 397, ff.); that in France and parts of Switzerland the right to employ excess condemnation to promote beauty is given expressly (France, Decree of March 26, 1852, as amended by par. 118 of the financial law of July 13, 1911, and by the law of April 10, 1912; Lausanne, Building Police Law of May 12, 1898, sec. 20); and in Belgium, under the law of November 15, 1867, by implication (see circular of Minister of Justice, dated November 12, 1867, in *Pasinomie ou Collection Complète des Lois, etc.*, Brussels, 1867, p. 286). Expropriation for æsthetic purposes is authorized by the Town Planning Acts in England and various other parts of the British Empire (for references to these acts, see p. 499, ff.). In New Zealand land may be taken to preserve the beauties of scenery (Public Works Act, Consol. Stats., Vol. IV, p. 879, sec. 14) and scenic land may be expropriated (Vol. V, No. 172). Canada has purchased her national battlefields at Quebec (Stats., 1911, ch. 6). See also Statutes of Saskatchewan, 1916, given on page 392 of this work.

[4] There are judicial dicta to that effect:—Shoemaker v. U. S. 147 U. S. 282 (1893); Boston, etc., Corp. v. Newman, 12 Pickering (Mass.) 467 (1832); Woodstock v. Gallup, 28 Vt. 587 (1856). It may be doubted whether the more recent case of Farist Steel Co. v. Bridgeport, 60 Conn. 278 (1891) decides anything but that there was not a taking for the purpose of establishing a harbor line in aid of navigation; although there are dicta which go further.

[5] See pp. 21, 393, note 19.

well as beautiful, were planted along city streets,[6] boulevards and parkways were laid out, giving opportunities for obtaining needful sun and air to the citizens as well as satisfying their desire for the adornment of their city, and the appearance of cities enhanced in countless ways without offending the legal or the practical instincts of the community. The little streams near our large cities, with the meadows through which they flow, are a menace to the health if neglected and allowed to fill with refuse and every imaginable filth;[7] the swamps breed

[6] A pioneer statute, providing for the planting and care of shade trees by municipalities, and the assessment of the cost upon abutters is P. L. New Jersey 1893, p. 496, now to be found in Comp. Stats., 1910, Vol. III, p. 3544, being sec. 335 and ff. of title called "Municipal Corporations," and frequently amended in detail. This statute has been adopted in substance or principle, or has led to the enactment of statutes to serve the same purpose, in many of the states of this country and provinces of Canada. The legal and practical questions involved in the location, ownership, and care of parking strips are also important and difficult to settle. Municipal forests which are such beautiful and healthful pleasure resorts as well as sources of profit abroad, are now being established to some extent in this country.

[7] In this connection the work of the Bronx Parkway Commission, organized under the laws of New York, 1907, ch. 594, 1913, ch. 757, 1916, ch. 599, for the reclamation of the Bronx River, flowing through Westchester County, and New York City, into salt water, is well worth study, and is set forth in the reports of the commission, of which that for 1917 and that for 1918, are especially interesting. In its 1918 report the commission says:

"Twenty years and more ago, the rapid spread of the City of New York to the north, in what is now the Borough of the Bronx, and the increasing population of the Westchester communities, lying in the Bronx River valley, as well as the inevitable consequences of unchecked pollution to the Bronx River by these populous and politically independent centers along its banks, gradually transformed what was once a small river of pure water into a foul stream. Too polluted to sustain aquatic life, it became a menace to the health of the community, obstructed as it was at many places by ever-growing masses of debris and rubbish. Periodically floods backed the foul waters upon the adjacent lowlands; or, sometimes by their force swept the unwholesome obstructions down the stream and, subsiding, deposited them some distance from the normal river channel or floated the whole foul mass into the beautiful lakes which constitute one of the greatest charms of Bronx Park [in the Borough of the Bronx, New York City].

"While this increasing menace to health was the immediate, pressing, and unavoidable occasion for legislative action to eliminate the nuisance and danger of the filth-choked stream, the City of New York had another vital need for such reclamation of the valley of the Bronx River as would provide a permanent outlet for its fast-growing motor traffic, from the cramped and growing metropolis to the open country to the north. This need was second in importance only to the necessity for the abatement of the river pollution. . . . It was apparent that an unobstructed avenue for motor traffic from the parks established in The Bronx, through to

mosquitoes and spread malaria; the rough broken land is fitted for housing or industrial use only at great expense; and all these lands are not only the most beautiful, but the cheapest property that can be acquired for park purposes.

The belief that eminent domain should not be used in this country to promote beauty, was to a considerable extent due to the distrust of the narrowly practical man, to whom the love of beauty is a "mere sentiment," and recreation a waste of time. The strength and the wane of such prejudices are indicated by two decisions of the Supreme Court of the United States worthy of citation in this connection; the first of these cases, Shoemaker v. U. S.[8] decided in 1892, holds that

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the open country to the north, would be of incalculable value to the metropolis."

Various solutions of the problem were suggested from time to time; of which the best and cheapest, also furnishing a beautiful and healthful parkway, playgrounds, and parks, was finally adopted, was, to take the river channel, and sufficient adjacent area to provide for a parkway, for perpetual public use. The fact that the Bronx River flowed through both Westchester County and New York City, raised a jurisdictional difficulty, which was solved by the appointment of a commission to do the work by the state, making it responsible to the state, the city of New York and the county of Westchester, and imposing three-quarters of the expense upon the city and the remainder on the county. Much of the land has been acquired, at very reasonable figures, by private purchase. The entire cost of administration, up to January 1, 1918, had amounted to three and one-half per cent of the value of the land acquired.

"To realize the full value of what has been accomplished in the elimination of contamination from the Bronx River," the commission goes on to say, "it is only necessary to compare its present condition with that of other streams, such as the Passaic River, which has recently engaged the attention of the United States Supreme Court, through a suit brought by the State of New York to restrain the Passaic Valley Sewerage Commission from carrying out plans for diverting raw sewerage from the river and discharging it through a sewer into New York Harbor. The proceedings adduced abundant testimony to show that pollution of the Passaic River by waste from breweries, tanneries, and other factories, as well as by organic filth from various sewers, has destroyed real estate values along the river valley.

"In a report of the proceedings in the Bulletin of the Merchants' Association of New York for Monday, October 14, 1918, is this significant passage:

"'Commissioner Childs, of the Passaic Valley Sewerage Commission, testified that the Passaic River was an open sewer; that the stench arising from the river destroyed property values and made real estate almost unsalable; that conditions were so offensive during the summer months that many factory employees had to abandon the locality and that others were made seriously ill; that the waters of the Passaic River were black with pollution.'"

[8] 147 U. S. 282.

land may be condemned for a public park. The Court says:

"In the memory of men now living, a proposition to take private property, without the consent of its owner, for a public park, and to assess a proportionate part of the cost upon real estate benefited thereby, would have been regarded as a novel exercise of legislative power.

"It is true that, in the case of many of the older cities and towns, there were commons or public grounds, but the purpose of these was not to provide places for exercise and recreation, but places on which the owners of domestic animals might pasture them in common, and they were generally laid out as part of the original plan of the town or city.

"It is said, in Johnson's Cyclopædia, that the Central Park of New York was the first place deliberately provided for the inhabitants of any city or town in the United States for exclusive use as a pleasure ground for rest and exercise in the open air. However that may be, there is now scarcely a city of any considerable size in the entire country that does not have, or has not projected, such parks.

"The validity of the legislative acts erecting such parks, and providing for their cost, has been uniformly upheld."[9]

The second case to be cited—U. S. v. Gettysburg, Elec. R'y Co.,[10] decided in 1896—held that the field at Gettysburg might be taken by the United States Government to preserve the memory of a great event in our history and stimulate the sentiment of patriotism, so essential to national life. The significance of these cases lies not so much in the decisions themselves as in the fact that the side which was ultimately defeated considered it worth while to carry them all the way up to the court of last resort in this country.

In 1892, in the Shoemaker case just cited, it was intimated that although land could be condemned for purposes of recreation it could not be taken for æsthetic purposes. In 1899, however, a Massachusetts court of last resort, in deciding the case of Attorney General v. Williams,[11] delivered the leading opin-

[9] Citing the cases.

[10] 160 U. S. 668.

[11] 174 Mass. 476 (1899). See also Same v. Same, 178 Mass. 330 (1901), 174 Mass. 476 was affirmed by Williams v. Parker, 188 U. S. 491 (1902-1903). A further development of the same proceedings, dealing with the question of damages will be found in Williams v. Boston, 190 Mass. 541 (1905-1906).

ion in favor of the employment of this power for the promotion of beauty.

In 1898,[12] Massachusetts had passed a statute limiting, with compensation, the height of privately owned buildings around the public Copley Square, in Boston. In upholding this restriction the court says in part:

"Looking to all its provisions in connection with the place to which they apply, it seems to have been intended as a taking of rights in property for the benefit of the public who use Copley Square. It adds to the public park rights in light and air and in the view over adjacent land above the line to which buildings may be erected. These rights are in the nature of an easement created by the statute and annexed to the park. Ample provision is made for compensation to the owners of the servient estates. In all respects the statute is in accordance with the laws regulating the taking of property by right of eminent domain, if the Legislature properly could determine that the preservation or improvement of the park in this particular was for a public use. The uses which should be deemed public in reference to the right of the Legislature to compel an individual to part with his property for a compensation, and to authorize or direct taxation to pay for it, are being enlarged and extended with the progress of the people in education and refinement. Many things which a century ago were luxuries or were altogether unknown, have now become necessaries. It is only within a few years that lands have been taken in this country for public parks. Now the right to take lands for this purpose is generally recognized and frequently exercised. *Foster v. Park Commissioners,* 133 Mass. 321. *Shoemaker v. United States,* 147 U. S. 282. Many statutes have been passed in this Commonwealth allowing taxation for purposes affecting the health, comfort, pleasure, and recreation of the people and thus conducing to their welfare. In *Kingman v. Brockton,* 153 Mass. 255, the court said, referring to a statute authorizing the raising of money by taxation for the erection of a memorial hall: 'That statute . . . may be vindicated on the same grounds as statutes authorizing the raising of money for monuments, statues, gates or archways, celebrations, the publication of town histories, parks, roads leading to points of fine natural scenery, decorations upon public buildings, or other public ornaments or embellishments, designed merely to promote the general welfare, either by providing for fresh air, or recreation, or by educating the public taste, or by inspiring sentiments of patriotism or of respect for the memory of worthy individuals. The reasonable use of public money for such purposes has been sanctioned by several

[12] Mass. St. 1898, ch. 452.

different statutes, and the constitutional right of the Legislature to pass such statutes rests on sound principles.' See also *Higginson v. Nahant,* 11 Allen 530, and *Hubbard v. Taunton,* 140 Mass. 467. In *Olmstead v. Camp.* 33 *Conn.* 532, 551, the court, in discussing the line between public and private uses, says: 'From the nature of the case there can be no precise line. The power requires a degree of elasticity to be capable of meeting new conditions and improvements and the ever increasing necessities of society. The sole dependence must be on the presumed wisdom of the sovereign authority, supervised, and in cases of gross error or extreme wrong, controlled by the dispassionate judgment of the courts.' The grounds on which public parks are desired are various. They are to be enjoyed by the people who use them. They are expected to minister, not only to the grosser senses, but also to the love of the beautiful in nature in the varied forms which the changing seasons bring. Their value is enhanced by such touches of art as help to produce pleasing and satisfactory effects on the emotional and spiritual side of our nature. Their influence should be uplifting and, in the highest sense, educational. If wisely planned and properly cared for they promote the mental as well as the physical health of the people. For this reason it has always been deemed proper to expend money in the care and adornment of them to make them beautiful and enjoyable. Their æsthetic effect never has been thought unworthy of careful consideration by those best qualified to appreciate it. It hardly would be contended that the same reasons which justify the taking of land for a public park do not also justify the expenditure of money to make the park attractive and educational to those whose tastes are being formed and whose love of beauty is being cultivated." [13]

[13] There are statutes limiting, with compensation, the height of buildings in the neighborhood of the State House in Boston (1899 ch. 457; 1901 ch. 525, 1902 ch. 543) and the State Capitol in Hartford, Connecticut (Laws 1907, ch. 186); and in the neighborhood of the proposed court house in New York City, the Municipality, under Laws 1911, ch. 880, sec. 15b. (added to Laws 1903, ch. 336) is given the right "to acquire as part of the real estate or interests therein for the purposes of this act such easements of light, air and access in, through, under or over other neighboring real estate or buildings, as considerations of convenience, health or beauty may suggest, including among the easements which may be acquired the right to limit and restrict the height, size, character and style of neighboring buildings, either existent or to be erected, as also the uses to which the same or any neighboring land may be put. For the purposes of this act, any property or buildings upon which any such limitation or restriction is placed shall be deemed a part of the courthouse site to the extent to which any interest therein shall be taken hereunder, or restrictions imposed. . . ."

For a statute of Saskatchewan, Canada, to accomplish these objects without compensation, see p. 392 of this work.

Massachusetts (Gen. Stats. 1920, ch. 45, sec. 11) has provided for the establishment, with compensation, of a building line opposite parks, and

Recent cases, so far as they have arisen, hold, and late treatises on the subject show, that eminent domain may now be used in this country for the fostering and protecting of the

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the limitation of heights of buildings at that line, and such limitations under the police power have been held to be unconstitutional; Com. v. Boston Adv. Co., 188 Mass. 348 (1905). See in this connection In re City of New York, 68 N. Y. Supp. 196, 200, 57 App. Div. 166, referring to Laws of 1899, ch. 257; St. Louis in its charter (art. VI, sec. 1) has authorized the exclusion with compensation of business structures and prohibited the carrying on of business on lands fronting on parks; Oregon (1921, ch. 343) authorizes the State Highway Commissioner to acquire rights of way along state highways for the preservation of scenic beauty. For the law with regard to the regulation of advertising, and building lines near parks, see pp. 184, 387, note 13, p. 395, note 22.

A most interesting bill for the improvement of the appearance of Washington, D. C., the payment of damages to those injured and the collection of the amount of these damages from the owners of property benefited, as special or benefit assessments, which never became a law, was introduced in Congress in 1910 (January 24; 61st Cong., 2nd Session, H. R. 19060, identical with S. 5715). It authorizes the commissioners for the district (sec. 1) to select certain highways, impose restrictions upon land abutting on them, including the establishment of building lines, and prohibitions as to the erection, alteration or use of buildings for business, and to make "such requirements as to height of buildings, materials of construction, and architectural design as shall secure, in the judgment of said commissioners, the beautiful and harmonious appearance, as viewed from the public streets, of all structures to be erected or altered on the land to which said restrictions shall apply: Provided, That no such designation shall be made unless the owners of ninety per centum, or more, measured by the front foot, of the property fronting upon the street, avenue, or part or parts thereof under consideration, shall in due form have dedicated, or granted, or conveyed, or assigned to the District of Columbia, in consideration of benefits received or to be received, easements in, to and upon their property by virtue of which said special restrictions may be established: Provided further, That the Commissioners of the District of Columbia may exercise their judgment as to whether such special restrictions shall cover only ninety per centum or more of frontage, the owners of which have conveyed easements as above provided, or, in addition to such frontage, any portion of the remaining property fronting on the highway, street, or avenue, or part or parts thereof under consideration.

"Sec. 2. That if said commissioners in the exercise of their judgment shall designate highways, streets, or avenues, or any part or parts thereof, and shall impose any special restrictions authorized by this act so as to include property fronting on any such highway, street, or avenue which has not been dedicated or granted or conveyed or assigned to the District of Columbia, then, at any time within one year from the date of any such designation, and not thereafter, the owner or owners thereof, or any person having an interest therein, may recover as damages just compensation from the District of Columbia for the taking, if any, of the easements involved in said designation, subject to deduction for benefits; and said damages and benefits and all benefits herein mentioned shall be appraised by a commission composed of three capable and disinterested persons, to be appointed by the Supreme Court of the District of Columbia, holding a district court of the United States for said District,

beautiful in nature and art. This evolution in our law is due more to general practice and its effect on public opinion than to legal decisions. The growing recognition of ethical values, as indicated in the Gettysburg case, and of the need of rest and recreation in pleasant surroundings, as so well stated in the Shoemaker case, have been potent factors in this evolution; but perhaps the greatest influence has been the constant practice of spending money raised by taxation for the adornment of public places. This fact is presented clearly and convincingly by Nichols in the latest edition of his standard work on *Eminent Domain*[14] as follows:

"From the earliest recorded times public money has been spent to make public buildings attractive, and under American constitutions it has long been considered proper for the nation, state or city to erect memorial halls, monuments, and statues and to plan public buildings upon a more expensive scale than if designed for utility alone. The public mind has thus been educated to feel that æsthetic

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upon application in writing, made within said year and not thereafter by such owner or owners or persons having an interest against the District of Columbia; and upon failure of any such owner or owners or person having said interest to thus present such claim within said period, said right shall cease and determine.

"Sec. 3. That the Commissioners of the District of Columbia be, and they are hereby, authorized and directed, as soon as practicable after every recovery of damages as just compensation as in this Act provided, to institute proceedings in said court to assess the amount of said damages, the interest thereon, and all costs whatsoever of the proceeding wherein the said damages have been ascertained against and upon all property covered by said designation, pro rata in proportion as said property may be found to be benefited, omitting from consideration all property found by the court in the proceeding to recover said damages as just compensation to have been damaged more than benefited."

* Secs. 4-7. Procedure in assessing benefits.

"Sec. 8. That the Commissioners of the District of Columbia are hereby authorized to appoint an advisory commission to consist of the inspector of buildings of the District of Columbia, the municipal architect of said District, two architects to be nominated by the Washington Chapter of the American Institute of Architects, and a landscape gardener, the two first named officials to serve without compensation and the other members of said commission to receive such compensation as may be fixed, from time to time, by said commissioners. The duties of said commission shall be to advise said commissioners in all matters connected with the purposes of this act, and to perform such other duties as may be assigned to it by the said commissioners."

* Sec. 9. Appropriation to carry out the act.

* Sec. 10. Enforcement and penalties.

[14] Second Edition (1917), Vol. 1, pp. 162-163.

* Summarized.

and artistic gratification are purposes public enough to justify the expenditure of public money, and to authorize the exercise of eminent domain in behalf of similar purposes was but a short step beyond." [15]

[15] "While there are some *dicta* that property cannot be condemned merely for ornamental purposes or for purposes of pleasure, and there is little, if any, direct authority to the contrary, yet the undoubted tendency of the more recent decisions is in the opposite direction, and the time is not far distant, it is believed, when it will be the accepted rule that a municipality may be authorized to condemn property for æsthetic purposes." McQuillin *Munic. Corps.* (1912 sec. 1485.)

"Public money may be expended in acquiring property to be used for purposes largely æsthetic in their nature, such as parks, boulevards, and museums, and in beautifying and adorning public buildings and other public property, already possessed. So, also, may the property of individuals be condemned for such purposes on payment of compensation." Note on "Exercise of Police Power for Æsthetic Purposes," 34 Lawyers Reports Annotated (1911), pp. 998-999.

"It is not necessary that every part of all highways should be used for the passage of vehicles and pedestrians. It is proper that some regard should be had for the æsthetic tastes, the comfort, health, and convenience of the public; and if the legislature had enacted that Clinton Avenue should be increased in width to the extent provided in this act, and had provided that a strip in the center of the highway, forty feet wide, should be devoted to trees and flowers, as is done in many of our cities, it would hardly have been questioned that this constituted a public use, in the same sense that a park preserve is generally recognized as a public use. Shoemaker v. U. S., 147 U. S. 282, 297, 13 Sup. St. 361, 37 L. Ed. 170, and authorities there cited. Because the legislature has preferred to leave this breathing space upon the sides of the street, subject to the limited use of the owners of the fee, does not change its essential character, and the improvement is undoubtedly much less expensive than the one which is suggested as within the legislative discretion." In re City of New York, 68 N. Y. S. 196, 200, 57 App. Div. 166, affirmed without opinion in 167 N. Y. 624 (1901); sometimes cited as "In the matter of Clinton Avenue." The New York law referred to is 1899, ch. 257.

Under chapter 170 of the Laws of New York for 1900, the Commissioners of Palisades Interstate Park were authorized to condemn such land in the vicinity of the Palisades, within certain limits, "as may in their opinion be proper and necessary to be reserved for the purpose of establishing a State Park and thereby preserving the scenic beauty of the Palisades." In a case under this statute it was decided that "the taking of land used as a stone quarry along the Palisades of the Hudson and adjoining the state park for the purpose of preserving the scenic beauty of the river and of the park, is a taking for a 'public use' though the land itself is so rugged as not to be adapted for use as a park." Bunyan v. Commissioners of Palisades Interstate Park, 1915, 153 N. Y. S. 622. See also Foster v. Park Com'rs., 133 Mass. 321 (1882).

The appropriation of the water of a stream for a waterfall essential to the beauty of a summer resort, is a legal appropriation for it, under the Colorado law which gives the first taker the legal right to the water; and a company demanding it for commercial uses, cannot claim that such uses are the only beneficial ones. In so deciding the court says:

"Is it no benefit to the public to spend money in making a beautiful place in nature visible and enjoyable? . . . It is a benefit to the weary, ailing and feeble that they can have the wild beauties of nature placed at their convenient disposal. Is a piece of canvas valuable only for a

Promotion of Beauty under Police Power.—It is neither possible nor desirable in all cases to attempt to promote the æsthetic or any other phase of the public welfare by the expenditure of public money. If the number of people affected by any measure is great, compensation for the resulting limitation of property rights is often impracticable, and regulation without compensation under the police power must be resorted to or the desired result will be practically unattainable. The question arises in any given class of cases whether regulation without compensation can reasonably and properly be imposed, the decisions turning upon the answer to such questions as whether the sacrifice demanded is too great and the end to be attained sufficiently important.

If the city dweller is to live in pleasing surroundings, not only public property but private property exposed to general view must be pleasing. This consideration applies especially to the city streets. The street, as legally defined, consists of the land within the street lines; the street to the ordinary citizen includes those parts of the buildings or other structures which border it and which he sees, and is intended to see, when pasing through it; indeed to him the character of the street is in these structures much more than in the mere street surface. Fifth Avenue in its street surface is not peculiarly distinguished from many other of the streets of New York; it is the buildings abutting on Fifth Avenue that make it one of the best known thoroughfares in the world.

In all civilized countries money raised by public taxation is spent to erect public buildings, to acquire for them suitable sites, and in countless ways to make the appearance of land

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tent-fly, but worthless as a painting? Is a block of stone beneficially used when put into the walls of a dam, and not beneficially used when carved into a piece of statuary? Is the test dollars, or has beauty of scenery, rest, recreation, health, enjoyment, something to do with it? . . . When the defendant company says the complainants are putting the fall of the water to no beneficial use, it means that the complainants are not ruining the beautiful scenery for cash." Cascade Town Co. v. Empire Water & Power Co., 181 Fed. Rep. 1011 (1910).

It was long ago held that roads might be laid out to provide access to places of beauty; Higginson v. Nahant, 11 Allen (Mass.) 530 (1866).

See in this connection, Appeal of Rees, 8 Sadler (Penn.) 582 (1888). Consult also 20 Corpus Juris, 583.

abutting on public streets attractive; but evidently most of this abutting land must and should be in private use and cannot be made pleasing to the passerby at public expense. If this is to be accomplished to any considerable extent it must be by restrictions imposed without compensation; and it only remains to determine whether regulations to this end which will not be unreasonably burdensome to the private owner can be devised to bring about this result. In spite of the many difficulties involved, European countries and Canada on this side of the water,[16] have found it possible to make and enforce such regulations; but, except for the amendment of the Massachusetts constitution, authorizing the regulation of bill boards,[17] we in this country have not as yet devised any method of doing so; for under our state constitutions the police power cannot be used to promote civic beauty;[18] although if the main purpose

[16] In the province of Quebec, Canada, under R. S. 1909, art. 5638, par. No. 1, municipal councils may pass by-laws to regulate the architecture, dimensions and symmetry of buildings in certain streets; and the municipal council of the city of Quebec, in an amendment to its charter (Laws, 1909, ch. 80, sec. 4) is given the same power.

In this connection, the following statute of the Province of Saskatchewan, Canada (1916, ch. 19), is of interest:—

"Establishing a Municipal Center

"211. In the event of the council acquiring land for the establishment of a municipal center, with a view to grouping together in some central location the municipal offices and other buildings of a public character, it shall be in the power of the council to pass bylaws or regulations prescribing the height, structural character and architectural features of all buildings on lands fronting on or adjoining such municipal center and the uses to which such buildings may be put, and prohibiting the use of any such buildings on such frontage or adjoining lands for the exhibition of advertisement hoardings, or the holding of travelling shows, or for any other purpose which the council may deem æsthetically offensive or obnoxious, having regard to the character of the locality as a municipal center:

"Provided that the council shall not be liable, in respect of any such bylaws or regulations or the enforcement thereof, to make compensation to the owners or occupiers of lands or buildings affected thereby, excepting in the event of any building having to be taken down, removed or altered in consequence of such bylaws or regulations, in which case the amount of compensation shall, failing agreement, be determined by arbitration in the manner provided for by part X of this Act."

[17] See p. 395, note 22.

[18] McQuillin, *Munic. Corps.*, Vol. III, sec. 929, and cases there cited. See to the contrary, however, Churchill et al. v. Rafferty, Collector, in the Supreme Court of the Philippines, Dec., 1915 (14 Official Gazette, p. 383, Feb. 16, 1916), and the long editorial on the case in the New York

of the measure in question justifies the employment of that power, the promotion of beauty may be a subsidiary consideration.[19] Legal writers have not all been reconciled to the law as thus stated; and the courts have on several occasions, in their dicta, shown the same feeling.[20]

Law Journal of October 16, 1916, in which, after stating its belief that some state in this country would be courageous and wise enough to uphold the æsthetic regulation of bill boards under the police power, that paper quotes among others, the following passages from the opinion of the court:

"The success of billboard advertising depends not so much upon the use of private property as it does upon the use of the channels of travel used by the general public. Suppose that the owner of private property, who so vigorously objects to the restriction of this form of advertisement, should require the advertiser to paste his posters upon the billboards so that they would face the interior of the property instead of the exterior. Billboard advertising would die a natural death if this were done, and its real dependency not upon the unrestricted use of private property, but upon the unrestricted use of the public highways is at once apparent. Ostensibly located on private property, the real and sole value of the billboard is its proximity to the public thoroughfares. Hence we conceive that the regulation of billboards and their restriction is not so much a regulation of private property as it is a regulation of the use of the streets and other public thoroughfares. . . .

"It may be that the courts in the United States have committed themselves to a course of decisions with respect to billboard advertising, the full consequences of which were not perceived for the reason that the development of the business has been so recent that the objectionable features of it did not present themselves to the courts nor to the people. We in this country have the benefit of the experience of the people of the United States and may make our legislation preventive rather than corrective."

In comment on the second quotation from the case the editors of the *Law Journal* say:

"It seems highly probable that the authority reasonably to regulate public æsthetics would now be recognized by the Supreme Court of the United States as not impugning the Fourteenth Amendment."

It should be especially noted in connection with the Rafferty Case that the Organic Act of the Philippines (39 U. S. Stats. at Large, 545 ch. 416 (Public No. 240), sec. 3, approved Aug. 29, 1916; repealing and superseding the similar provision, 32 Stat. 691, ch. 1369, Publ. No. 235, sec. 5, approved July 1, 1902. These acts, and others, will be found in a compilation, issued by the Government Printing Office in 1920, entitled "Acts of Congress and Treaties Pertaining to the Philippine Islands in Force July 1, 1919) incorporates the provisions of the Fourteenth Amendment of the United States Constitution, that no person shall be deprived of property without due process of law, which is one of the provisions upon which the courts base their decisions that æsthetic regulation of billboards is unconstitutional.

[19] Welch v. Swasey, 193 Mass. 364 at 375.

[20] A Maryland statute (1904, ch. 42) provided that no building to exceed seventy feet in height should be erected in a designated portion of the city of Baltimore, in the center of which stands the Washington Monument. The statute was attacked as a taking of private property

There is little doubt that if a state, by amending its constitution, expresses its belief and purpose that the police power shall be used conservatively for given æsthetic purposes, the

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without compensation for a purely æsthetic purpose and therefore for a private use, which was unconstitutional. The Court, in sustaining this contention, says:

"Such is undoubtedly the weight of authority, though it may be that in the development of a higher civilization, the culture and refinement of the people has reached the point where the educational value of the Fine Arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction, under some circumstances, to the exercise of this [police] power even for such purposes. . . ."

The statute was upheld, however, on the ground that the object of the act is not merely to preserve the architectural beauty of the locality but also to avoid the increased danger from fire which arises from tall buildings in the event of a general conflagration. Cochran v. Preston, 108 Md. 220 (1908).

"It is generally assumed that the prohibition of unsightly advertisements (provided they are not indecent) is entirely beyond the police power, and an unconstitutional interference with the rights of property. Probably, however, this is not true. It is conceded that the police power is adequate to restrain offensive noises and odors. A similar protection to the eye, it is conceived, would not establish a new principle, but carry a recognized principle to further application. It is true that ugliness is not as offensive as noise or stench. But on the other hand offensive manufactures are useful and the offense unintentional and inevitable, whereas in the case of an advertisement the owner claims the right to obtrude upon the public an offensive sight which they do not want, and which but for this undesired obtrusion, would not be of the slightest value to him." Freund, *Police Power*, p. 165.

In sustaining a St. Louis billboard ordinance, providing that:—

(*a*) No billboard shall exceed fourteen feet in height.

(*b*) Billboards shall have open spaces of four feet from the lower edge to the ground.

(*c*) Billboards shall not be nearer than six feet to a building or the side line of any lot or nearer than two feet to any other billboard.

(*d*) Nor over five hundred square feet in area or closer to the street line than fifteen feet.

a Missouri Court says:

"This is a legitimate and honorable business, if honorably and legitimately conducted, but every other feature and incident thereto have evil tendencies, and should for that reason be strictly regulated and controlled. The signboards and billboards upon which this class of advertisements are displayed are constant menaces to the public safety, and welfare of the city; they endanger the public health, promote immorality, constitute hiding places and retreats for criminals and all classes of miscreants. They are also inartistic and unsightly.

"In cases of fire they often cause their spread and constitute barriers against their extinction; and in cases of high wind, their temporary character, frail structure and broad surface, render them liable to be blown down and to fall upon and injure those who may happen to be in their vicinity. The evidence shows and common observation teaches us that the ground in the rear thereof is being constantly used as privies and

Supreme Court of the United States will not declare the state action invalid.[21] Many such amendments have from time to time been offered in the various states, but as yet Massachusetts is the only state in which any such amendment has been adopted.[22]

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dumping ground for all kinds of waste and deleterious matters, and thereby creating public nuisances and jeopardizing public health; the evidence also shows that behind these obstructions the lowest form of prostitution and other acts of immorality are frequently carried on, almost under public gaze; they offer shelter and concealment for the criminal while lying in wait for his victim; and last, but not least, they obstruct the light, sunshine and air, which are so conducive to health and comfort. . . .

"The amount of good contained in this class of business is so small in comparison to the great and numerous evils incident thereto that it has caused me to wonder why some of the courts of the country have seen fit to go as far as they have in holding statutes and ordinances of this class void, which were only designed for the suppression of the evils incident thereto and not to the suppression of the business itself. . . . My individual opinion is that this class of advertising as now conducted is not only subject to control and regulation by the police power of the state, but that it might be entirely suppressed by statute, and that, too, without offending against either the State or Federal Constitution." St. Louis Gunning Adv. Co. v. St. Louis, 235 Mo. 99 (1911).

"The views in and about a city, if beautiful and unobstructed, constitute one of its chief attractions, and in a way add to the comfort and well-being of its people. Billboards for advertising purposes, erected to any great height, would undoubtedly be subject to all of these, as well as other, objections, and such structures are, therefore, plainly within the regulating power of the governing of a city." Matter of Wilshire, 103 Fed. Rep. 620 (1900). See also 20 Harvard Law Review, 35. An important case, recently decided, of general interest on this subject, is St. Louis Poster Adv. Co. v. St. Louis, 249 U. S. 269 (1919).

[21] See p. 22.

[22] Amendment to Constitution of Massachusetts adopted November 5, 1918: "Art. L. Advertising on public ways, in public places and on private property within public view may be regulated and restricted by law." Under this amendment a statute (Gen. Laws 1920, ch. 93, secs. 29-33) has been enacted empowering the division of highways of the department of public works of the state to pass rules and regulations with regard to such advertising; and such regulations were issued, Dec. 20, 1920. These rules still leave the owner of land abutting on a highway free, in most cases, to display outdoor advertising in full view of it; but no such advertising is allowed "within the bounds of any highway"—a prohibition that may be made in any state, and is made in many of them—"nor on any location within 300 feet of any park, parkway, playground, state reservation, or public building," nor "upon any rock or tree nor upon any fence or pole bordering any public highway." The regulations further provide that "no permits shall be granted for the location or maintenance of signs near certain highways in territory which, in the opinion of the division, is of unusual scenic beauty. Such places will be designated by the division from time to time." The right is reserved to pass upon the subject matter displayed and to approve of the size, shape and material of signs.

An amendment covering the field more completely, prepared by the

Promotion of Beauty Without Compensation in Europe.—In Europe regulations imposed by the state without compensation and thus analogous to our police power, are used, independently or in conjunction with eminent domain and compensation, to preserve and promote beauty, and prevent the defacement of private property exposed to public view. These regulations may for convenience be classified under two heads:—the more general provisions for these purposes and the provisions formulated to cope with the abuses of out-door advertising.[23]

Classification in France.—Probably no country in Europe has been more active and intelligent in its efforts to protect its art treasures and natural beauties than France.[24] Legislation

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author for presentation to the Moot Constitutional Convention of the National Municipal League, held at Cleveland, Ohio, December 29, 1919, and unanimously adopted, reads as follows:

"The preservation of places and things of historic significance or of beauty difficult or impossible of replacement or duplication, and the promotion of the beauty of the view of or from public places or structures being in the public interest, reasonable regulations with respect to private property may be enacted to these ends."

A shorter amendment was proposed by Albert S. Bard, Esq., of New York City, reading as follows:

"Reasonable regulations may be enacted with respect to the appearance of private property visible from any public place."

[23] With relation to æsthetic legislation in Europe generally see: French Law—*La Beauté de Paris et La Loi* by Charles Lortsch, Librairie Recueil Sirey, 22 rue Soufflot, Paris, 1913; *La Beauté de Paris* by Charles Magny, Librairie Bernard Tignol, 53 bis quai des Grand Augustins, Paris, 1911; *Comment Reconstruire nos Cités Détruites,* by Agache, Aubartin and Redont, Librairie Armand Colin, Paris, 2d ed. 1916. German Law: *Das Kgl. Sächs, Gesetz gegen Verunstaltung vom 10 März 1909,* Rossberg'sche Verlagsbuchhandlung, Leipzig, 1909, which contains a preface with an excellent history of the entire European movement, and the laws on the subject not only of Saxony but of several of the other German states.

[24] But not more so than in Italy. The regulation and prohibition of the export of certain classes of works of art began in Rome in the fifteenth century under Popes Paul II and Sixtus IV. Noteworthy are the Lex Doria Pamphili of 1802 and the Lex Pacca of 1821, which remained in force until 1902. Similar statutes are to be found in a number of other Italian cities in the nineteenth century. Protection of movable works of art and articles of historic interest led to the protection of buildings and places of like character. The statutes at present in force throughout Italy are the law of June 20, 1909, n. 364, as amended by the law of June 23, 1912, n. 688. More or less similar laws, since amended, have been passed in Sweden (1867), various cantons of Switzerland, Denmark (1869), Roumania and Portugal (1892). Japan has recently passed a law for the preservation of the beauty of landscapes and of historical and natural monuments (Law No. 44 of 1919; see also decrees Nos. 261,

for this purpose began there in 1830. In 1887, to accomplish this purpose, she adopted a system which is generally referred to as "Classification." By this system she protects both public works of art—a matter of no special legal difficulty—and privately owned objects and places of beauty. On December 31, 1913, she codified most of her legislation on this subject, in a law somewhat inaccurately entitled the "Law with regard to Historic Monuments" [25] which may be summarized as follows:

Real properties belonging to the state, a department, a commune, a public establishment or a private individual, the conservation of which, from the point of view of history or art, is for the public interest, may be classified as historic monuments. The classification is made by the Minister of Fine Arts subject to an appeal to the Council of State. Upon notification to the owner of the intention of the Administration of Fine Arts to ask for classification, all the requirements of classification apply. They cease to apply if the decision to classify is not made within six months of this notice. If the property is private, and the owner does not consent, the classification in some cases gives rise to a claim of indemnity proportionate to the injury caused by such a classification.

Classified public property cannot be sold until the Minister of Fine Arts has been notified and been allowed fifteen days within which to give his opinion on the subject; in default of this notice the Minister may within five years nullify any such conveyance.

No classified property shall be destroyed, removed in whole or in part, restored, repaired or in any way changed or added to without the consent of the Minister of Fine Arts. He may always repair or maintain private classified property when necessary for its conservation.

No person can acquire any right by prescription in a classified property or easement in it which may cause it injury, or any

281 of 1919) a translation of which will be found in the report for 1920 of the American Scenic and Historic Preservation Society, to the Legislature of the State of New York, p. 422 ff. In this connection the reports of the Society contain much valuable information. The law of England and of the German states is given below.

[25] Passed Dec. 31, 1913. A translation of the law practically in full is given on p. 423, ff. of this work.

easement [26] whatever except with the consent of the Minister of Fine Arts.

The effects of classification run with the land and bind all those subsequently acquiring any interest in it. Whoever conveys a classified property shall notify the purchaser of the classification and shall, within fifteen days of such conveyance, notify the Minister of Fine Arts.

A list of classified properties and orders and decrees of classification shall be recorded in the Bureau of Mortgages of the locality where the property is situated. There shall also be drawn up a list of properties which, while not justifying a special demand for immediate classification, should nevertheless be preserved. The owners of properties entered on the list shall be notified and shall not make any alteration of such property until after five days previous notice to the prefect.

The Minister of Fine Arts, on behalf of the state and the departments and communes, after the Minister has had an opportunity to be heard, may expropriate property classified or proposed for classification. No new structure shall be classified without the authority of the Minister of Fine Arts.

Property may be wholly or partly declassified by a decree of the Council of State on petition of the Minister of Fine Arts or the proprietor.

Movable objects, including fixtures, the conservation of which from the point of view of history or art is in the public interest, may also be classified by direction of the Minister of Fine Arts, much like real property. Private property of this sort can be classified only with the consent of the owner or by a special law. The exportation of classified objects from France is prohibited. The Administration of Fine Arts may order the provisional transfer of a classified movable for safety, but within three months measures must be taken for its permanent security. The owner may obtain its return on satisfying the authorities that the article will be safe.[27]

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[26] Known as "Servitude" in Roman law countries.

[27] Hesse (Law for the Protection of Monuments, etc., of July 16, 1902, to be found also in the book on the Saxon law, referred to on p. 396) and Württemberg (Building Ordinance of July 28, 1910, Tübingen, 1912, art. 97) have adopted the system of classification in the protection of

Like "historic monuments," places of natural beauty are also classified in France, and with much the same effect in law.[28]

Protection of Ancient Monuments and Places of Beauty in England.—The English act which provides for the preservation of objects of beauty is much like the French law passed to effectuate the same purpose, and is of especial interest to us because of the similarity of our legal systems. The English statute is entitled "Ancient Monuments Consolidation and Amendment Act, 1913." [29]

The original act was passed in 1882.[30] It extended only to prehistoric remains and merely authorized the Commissioners of Works to purchase such monuments, receive them as gifts, or accept the guardianship of them if offered by the owner for this purpose. As a part of the monument were included its site and access to it. Monuments in the custody of the Commissioners might be maintained by them. Any person, including the owner if he had relinquished its custody, who injured or defaced an ancient monument, was guilty of a crime.

In 1900 the act was amended [31] to include in its protection any monument or structure of historic, traditional, artistic or architectural public interest; but remained permissive.

The act of 1913 adds compulsory provisions. Under the present act, if the preservation of the monument is of national importance and it is in danger of destruction, or removal, or damage from neglect, or injudicious treatment, a "preservation order" may be issued, placing it under the protection of the commissioners. Such an order, unless confirmed by Parliament, expires in eighteen months, and no such order shall thereafter be issued for five years.

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private property of general historical and artistic interest. The statute of Hesse follows the French statute closely and the Württemberg provisions conform to it in general principle, using building regulation, in part, for the purpose.

[28] "Law for the Protection of Places of Beauty," of April 21, 1906, a translation of which is given practically in full on p. 422 of this work.

[29] 3 and 4 Geo. V, ch. 32. The statute is given practically in full on p. 432 of this work.

[30] 45 and 46 Vict. ch. 73.

[31] 63 and 64 Vict. ch. 34.

The commissioners shall from time to time make and publish a list of monuments the preservation of which is of national importance. Any owner who proposes to demolish, remove, structurally alter or make additions to any such monument shall first notify the commissioners and shall not, except in case of urgent necessity, commence any such work for one month thereafter, on penalty of fine and imprisonment.[32]

Building Regulation in Germany in the Promotion of Beauty.—It is by rules forming a part of the system of building regulation characteristic of Germany, Switzerland and Austria, that these countries for the most part seek to promote and preserve the beauty of private property exposed to public view. The system prevailing in Germany will be here described as typical of that in all three countries.[33] Before this can be done, however, it will be necessary to consider briefly the law in Germany with regard to æsthetics generally.[34]

The German states have for many years authorized the issuance of police ordinances for æsthetic considerations. Thus the Prussian law, as early as 1794, empowered the police to make ordinances for the purpose of preventing the disfigurement of public places [35] but, under the decisions, only a gross disfigurement could be so dealt with; and this in most of the states remained the law until about the year 1907. Certain cities, among which may be noted Frankfort [36] and Hildesheim [37] passed local statutes or ordinances before 1907 requir-

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[32] Secs. 18 and 19 of the act, given in full on pp. 43, 99 of this work, are most interesting. They relate to phases of the subject that will be taken up later, but for a complete idea of the statute, should be read in this connection.

[33] The law of the city of Lausanne of January 15, 1915, should be noted in this connection.

[34] For the system used in Hesse and Württemberg, see p. 398, note 27. Most if not all the German states have classified their public art treasures and systematically inspect and protect them. See Balz, *Baupolizeirecht,* 4th ed. Carl Heymann's Verlag, Berlin, 1910, p. 96, for Prussia; and the annotated editions of their building laws for the law and its administration in other states. Private property of beauty or general interest may be expropriated. *Württemberg* Building Ordinance of July 28, 1910, art. 97 cited on p. 398 above; *Hesse,* Law of July 16, 1902, also referred to on p. 398 above.

[35] A. L. R. (Allgemeines Landrecht or Code of Prussia, the work of Frederick the Great), I, 8, sec. 66, 71.

[36] "Ordinance to Maintain the Ancient Character of Parts of Certain

ing new structures in the older sections of the city to conform to the ancient styles of architecture; but the validity of these statutes was considered at least doubtful.

About the year 1907 the German states began to pass legislation giving the authorities increased power to promote public beauty and prevent public disfigurement, and at present there are general statutes, or amendments to the general building laws or ordinances to this effect in most of these states, and ordinances or local statutes taking advantage of these powers in many of their cities.

Establishment of Street and Building Lines Partly for Æsthetic Reasons.—The German requirements for the promotion or preservation of the beauty of private property exposed to public view are made either as requisites to be observed by the public authorities in the establishment of street and building lines, etc., or as conditions to be fulfilled by the property owner before he can obtain a building permit.[38]

In Germany the lines of future streets are fixed by plans made long before the land for the streets is acquired. These plans bind private property and are established under the police power without compensation.[39] For many years the building police have been empowered and directed to pay due regard to considerations of æsthetics in fixing these lines. The weight which might be given to æsthetic considerations under the earlier statutes and the decisions interpreting them was much less than under the more recent laws. Thus the Prussian City Planning or Building Line Statute of 1875 provides that:

"Sec. 3. In establishing street and building lines, due regard shall be paid to the requirements of traffic, safety from fire, and public health, and care shall be taken that there shall not be any disfigurement of the streets:"[40] to which the Housing Law of 1918 has added, "nor of the general view of the town."[41]

Streets in the Old City," passed Feb. 27, 1900, and repealed and superseded by the local statute against defacement, passed Nov. 3, 1911, by virtue of the Prussian Act of 1907.

[37] Passed June 17, 1899.

[38] As to Hesse and Württemberg, see ante, p. 398.

[39] See p. 454 below.

[40] For a translation of the entire law, see p. 466.

[41] See p. 473.

The cases in interpretation of this æsthetic provision point out the fact that it is based upon the General Land Law,[42] and that, therefore, "disfigurement" means "the production of a condition that is positively ugly, and offends the eye of every impartial observer." Under Art. II of the Württemberg law, of July 28, 1910, however:

> "In the establishment of new and the change of existing city plans and building lines . . . care shall be taken to preserve buildings of artistic and historic value, objects of natural beauty . . . attractive street and landscape views; and that in the construction of newly planned streets and squares, new views of like nature shall be created."

In practice cities in other countries fix their street lines in part for æsthetic reasons;[43] but in this connection as in others Germany has worked out her legal system more definitely and explicitly than has been done elsewhere.

Issuance of Building Permit Subject to Fulfillment of Æsthetic Requirements.—In all civilized countries a permit is required for the erection, alteration or repair of any structure and for the construction of any addition to it; and such work must fulfill certain requirements or the permit will not issue. In all these countries these requirements include provisions with regard to stability, hygiene, etc.; in Germany there are also æsthetic requirements. These æsthetic prerequisites to the issuance of the permit may for convenience be

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[42] A. L. R., 1, 8, secs. 66, 71.

[43] Thus the Paris building and street line statute with its invariable height limit for the building proper and limiting angle for the roof, is framed to produce, so far as possible, the uniform sky line so dear to Parisians (see *Les Règlements de Voirie*, by Louis Bonnier, Charles Schmid, Editor, 51 Rue des Écoles, Paris, 1903); while the New York City zoning resolution allows towers to any height on a given portion of the lot, and, limiting height, generally at the street line, permits greater height with setbacks (see p. 270), to preserve the irregular sky line, so characteristic of the city; thus producing many buildings, new in type, of great beauty. The primary purpose of the rules in both cities is to preserve the supply of light and air and lessen congestion.

Everywhere, also, building regulation allows the projection beyond the line fixed for buildings, of ornamental features, to encourage builders to include them in their plans.

roughly divided into those of the period before the legislation of 1907 already referred to and those of that period.[44]

Æsthetic Legislation of 1907 and Thereafter.—In the building laws and ordinances of the various states, as this legislation existed prior to 1907, there were provisions, differing in the different states, making certain specific requirements with regard to the appearance of private property to be exposed to public view, enforced by refusal to issue permits if they were not complied with; such as, for instance, that the walls of buildings visible from the street should be finished like façades, and not left rough[45] or painted in harsh colors.[46] These provisions were limited to the prevention of what was considered gross disfigurement of the public streets; for beyond this the law did not permit the building police to go.

The aim of the legislation of 1907 and thereafter was to authorize the making of stricter regulations to promote public beauty. More specifically the purpose of these laws was to permit (1) the prevention of disfigurement of public places even if it could not be said in law to be gross,[47] provided an unreasonable burden was not thereby imposed upon property owners; (2) the making, subject to the same proviso, of special requirements with regard to the appearance of buildings in special localities; (3) the more drastic suppression of the evils of outdoor advertising—a subject to be considered later.

To accomplish all three of these purposes some states have passed general laws, while other states have amended their general building laws or ordinances; and in substance, also, the

[44] It should be noted, however, that in some states there was more progress in this direction before 1907 than in others; and that at present æsthetic legislation still lags in some jurisdictions.

[45] E. g., Frankfort, ordinance of June 4, 1912, sec. 8, par. 5, given in translation on p. 229 of this work: to be found in the same form in earlier ordinances, as for instance that of July 15, 1884, sec. 9; Munich, Staffelbauordnung of April 20, 1904, sec. 10, parts I, X; Munich Building Ordinance of July 29, 1895, as amended March 21, 1900, and Aug. 3, 1910, sec. 67.

[46] Façades shall not be painted in harsh colors; Bavarian Building Ordinance of Feb. 17, 1901, sec. 53, par. II, Building Ordinance of Anhalt of June 19, 1905, sec. 64, par. 2.

[47] The Prussian Statute of 1907, however, still requires "gross" disfigurement before it grants redress.

provisions vary in the various states. The general statute of the Kingdom of Saxony, passed March 10, 1909,[48] is fairly typical of all this legislation.[49] The provisions of that statute to prevent disfigurement of public places generally and to allow special requirements to be made in certain localities—the portions of the statute now to be considered—are as follows:

"Sec. 2. The building police permit for the construction and alteration of buildings may be refused when thereby a building, or its surroundings, or a street, a built up locality or a country landscape would be disfigured; provided that a disproportional economic injury or expense shall not thereby be caused the owner. . . ."

"Sec. 3. Local statutes may provide that for given streets or squares of historical or artistic importance the building police permit for the construction or alteration of buildings shall be refused if the character or appearance of the locality or street would be impaired thereby."

"Sec. 4. Local statutes may provide that the building police permit for structural alterations of single buildings of historical or artistic importance or for the construction or structural alteration of buildings in the neighborhood of such structures may be refused when their characteristic appearance or the effect that they produce, would thereby be impaired."

"Sec. 9. If by the enforcement of the provisions of secs. 3 or 4 . . . a disproportionate economic injury or expense would be caused, the building police may, after hearing the representatives of the municipality or the lord of the manor, waive the provisions in question when the structure as planned would conform to the character of the building and its surroundings."

The German law of the period of 1907 and thereafter for the preservation under the police power, without compensation, of the beauty of private property exposed to public view, of which the clauses of the statute just quoted give us a fair idea,

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[48] Gesetz- und Verordnungs-blatt, 1909, Nr. 25.

[49] As examples of general laws, see, in addition to the Saxon statute, referred to in the text, the Prussian statute of July 15, 1907 (*Gesetz Sammlung*, or Collection of Laws for that year, p. 260); and as examples of clauses in building laws, etc., see Baden, Building Ordinance of Sept. 1, 1907, sec. 33 (and long note to same in the edition of Roth, Karlsruhe, 1909); Bavaria, Polizeistrafgesetzbuch, art. 101, par. 111, as amended July 6, 1908, and sec. 53, par. IV, of the Building Ordinance, passed under it, the provision having been in force in cities of over 20,000 inhabitants, since 1900; Württemberg, Building Ordinance of July 28, 1910, art. 97 and especially art. 98, par. 2.

has for its aim three very different objects:—(1) to preserve structures of historic or artistic importance, (2) to prevent public disfigurement in general, (3) to require structures and structural alterations in localities of special beauty or interest to conform to special standards.

The provision for the preservation of private structures of historic or artistic importance is admittedly incomplete. The police have no right in any case to prevent the owner from destroying his building,[50] or to forbid him to alter it if this refusal imposes upon him a disproportionate economic injury or expense. For the preservation of such structures the police power alone is in its very nature inadequate and the power of eminent domain must also be employed; as, for instance, is done in France and other countries under the system of classification. Eminent domain is in fact resorted to in Germany for this purpose, the building police notifying the authorities of the imminent destruction of a historic or artistic monument and meanwhile withholding the permit, in order that time may be given to condemn the monument if it seems wise to do so.

Preservation of Character of Special Localities.—The provision authorizing the making of special requirements for structures and structural changes in special localities, like the provisions for the protection of the appearance of the city generally, is regarded in Germany as a provision permitting the prohibition of public disfigurement; for the special locality is injured by a structure below its special standards just as the city generally is injured by a structure transgressing its general standards. This rule for special localities, like all wise and conservative æsthetic laws, is based also on economic considerations. The special character of the special locality is an asset of value to every property owner of that locality, of which no one owner has the right arbitrarily to deprive the rest.[51-53] This provision is only another application of the rule of jurisprudence and justice which, in all systems of law, requires every one *"sic utere tuo ut alienum non laedas."*

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[50] See Roth, *Baden Building Ordinance,* pp. 116-17, note; Balz, *Baupolizeirecht,* p. 96, note 6.

[51-53] See Roth, *Baden Building Ordinance,* p. 113, note 4.

Dangers of Artistic Censorship.—There are grave dangers in the policy of establishing an official censorship of any branch of art. The official taste may perhaps be better than that of the inferior artists but can seldom be equal to that of the best; and in any event the imposition of a standard is likely to suppress originality and establish uniformity. These dangers the German officials have, on the whole, been remarkably successful in avoiding. They do not themselves make plans or designs, or deal with the owner, thus superseding the architect; but instead revise the professional plan submitted to them; and they do not attempt to introduce into these plans what is admirable but only to eliminate what is inappropriate, elaborate and useless. In so doing they almost invariably lessen the cost of the structure to the owner instead of increasing it.[54] These are also the principles which some of the most successful of the art commissions in this country have adopted, with the same result, in passing upon structures to be placed upon public property.[55] Nor should it be overlooked that the German Building Police, in causing the private structure to be less objectionable to the general public, are also making it more valuable to the owner; for, as every practical real estate owner or dealer knows, an attractive structure built at less cost, often rents or sells more readily and for a larger sum than a more expensive structure in which appearances have been disregarded.[56] The results attained in Germany are often charming; but, even if we do not always approve of them, we must

[54] These functions are exercised by "Bureaus of Building Advice." Such bureaus existed before 1907, exercising in most states more limited powers with less assurance of their legal right to act than since 1907.

[55] See p. 563.

[56] This is true the world over. In the course of giving the writer oral instructions as to the investigations he was to make in Europe in behalf of the Heights of Buildings Commission of New York City in 1913, the chairman said: "You will investigate the regulations with regard to the appearance of streets and private structures on them"—Here a member of the committee interrupted—"That would be of no use to us; we cannot in this country pass æsthetic regulations under the police power."

"Let me finish," said the chairman, "Their appearance *as affecting their rental and sale value.*"

The objection was not pressed.

remember that it is not German architecture which we are here studying but German city planning administration.

With the exception of the provisions against the abuses of outdoor advertising, few, if any, attempts have been made outside of Germany to regulate for æsthetic reasons, under the police power, the use of private property exposed to public view. In France and elsewhere the authorities have offered prizes for the best façades erected in a given time. Thus in Paris there is, every year, a "Concours des façades," or competition of architects and builders, authorized by the Municipal Council, and approved by the prefect,[57] and the owners of the six best houses built during the preceding year are exempted from half of certain municipal taxes, and a medal is given the architect of each of them. Perhaps the only statute passed in the United States with the same general end in view is the following, evidently inspired by German precedent:

"Cities of the first class [i.e., Milwaukee] are authorized in connection with architects, associations or otherwise to establish a bureau of building plans for public and private buildings for the use of citizens of such cities contemplating erecting buildings to the end that uniformly good architectural plans may be secured for all buildings public and private, such bureau to conform in its functions as near as may be to plans adopted in Europe in like cases." [58]

And in England the local authorities may vary local by-laws so that new buildings may harmonize with existing structures of artistic merit in the neighborhood.[59] These enactments, so much more limited in their purpose and effect than the German provisions, do not attempt an adequate solution of these problems. For this reason the German law, which alone makes this attempt, is well worth consideration and study.

Outdoor Advertising.—Everywhere the control of outdoor advertising is a difficult and important matter, because everywhere outdoor advertising has become a vast business

[57] Council vote of the 6th and 20th of December, 1897, and the 19th of June, 1908; prefectorial decree of February 2, 1898, and May 18, 1909.
[58] Laws Wisconsin 1909, ch. 95.
[59] See p. 439.

enterprise; and because, owing to the manner in which it is carried on, this advertising is often obtrusive and ugly, as for instance when huge billboards, covered with chewing gum and patent medicine announcements, line beautiful boulevards, adjoin fine public buildings or face charming public parks.[60]

Legally the control of outdoor advertising is a complex problem, involving as it does the conflicting rights of public authorities and private owners in public property and land abutting on it, and the power of the public under the police power and the power of taxation to deal not only with æsthetic but with structural and fiscal questions.

Practically, therefore, outdoor advertising should be dealt with in all its phases as one huge subject and it is in this way that the legal aspect of it will be here considered, the law of this country on the subject being first taken up.

Advertising on Public Property.—Outdoor advertising may occupy one of two situations: it may be on public property or it may be on private property so located as to be visible from public property.

Advertisements might conceivably be affixed to public buildings or placed in public parks or similar public open spaces. This, however, seldom occurs.[61] Advertisements on public property are perhaps oftenest to be found on the approaches to or in the stations of quasi-public transit companies or upon or in their vehicles. Of necessity these stations are often on or over the public streets, and these vehicles run on or over these streets. In the case of subways the stations and vehicles are usually under the streets, in which instance—if the entire ownership of the land used as a street is in the public, instead of a mere easement for street uses—the subway stations and cars are also on public property.

The advertisements displayed by these companies are seldom

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[60] Mr. G. K. Chesterton in a recent address is reported by the New York *Tribune* to have said that his first thought on seeing the restless lights of Broadway was "what a sublime fairyland this would be to anyone who by some good fortune could not read!"

[61] During the late war, however, patriotic advertisements were often so placed, and private posters soon followed; but recently this nuisance has lessened.

connected with the business of transport for which the companies were chartered; the companies sell the advertising spaces to others.

Over the business of selling advertising space, carried on as above described, the public has control for two reasons: first, no corporation may engage in any business except as authorized by its charter, and the charter right to engage in the business of public transport does not include the right to sell advertising space; secondly, no corporation or other person may advertise or authorize others to advertise on public property without public consent. There are decisions holding that on account of the fact that transportation companies are so commonly allowed, nowadays, to sell advertising space, the giving of the privilege will be inferred; but whether these decisions, under present conditions, are right or wrong, the danger of this presumption may be overcome by an express term, properly drawn, in the charter or operating contract.

The control of the public over advertising on public property is complete. If, therefore, the public authorities have not by express or implied irrevocable terms in charter or operating contract, wholly or partly lost control, they may forbid advertising altogether, or limit its amount or regulate its character or location as they see fit. Whether any measure of control has been lost or not, such advertisements may be taxed, and there is no legal reason why this taxation should not, to a reasonable extent, increase progressively with the size of the advertisement, thus indirectly discouraging large advertisements. Taxation also, however imposed, would tend somewhat to decrease the total amount of advertising.

There is no reason why the average advertisement should be large. A small advertisement among small advertisements, if so situated or designed as to be easily read, is as valuable as a larger advertisement among others of the same size. It is all a matter of relative prominence. Then, too, design is more likely to catch and hold the attention than mere size, and is much more admirable. A decrease in the size and total area of signs in public service stations would make it possible to group and locate them without interfering with the appearance of the

structure. It is mere waste to decorate a building expensively and beautifully, as, for instance, has been done in the subway stations in New York City, and allow, as is done there, huge, badly located signs and billboards to obliterate and cut into the designs.

Advertising on Private Property.—To be classed also as advertising on public property, subject to regulation as such, are advertisements attached to private property in so far as they project upon or over public property, as is often the case with signs on private buildings situated along public streets. Advertising wholly on private property, so situated as to attract public attention and deriving its value entirely from its ability to do so, is, in its nature, as public as advertising on public property. Nevertheless such advertising on private property is regarded in law as a totally different enterprise.

Signs on private property may be used either to advertise business carried on upon the premises, or to promote the sale of goods made and sold elsewhere. It is with relation to advertising for the latter purpose that most of the abuses occur.[62]

Signs may be situated upon roofs, upon the front of buildings or upon billboards on the ground. Each class of signs has its special structural danger, and, as a structure or as something attached to a structure, may be regulated freely as such. Roof signs may succumb to wind pressure and fall, or may interfere with firemen in their duties; signs on the front of buildings prevent the entrance of light and air; and billboards screen those inclined to commit deeds of lawlessness and nuisance. To prevent these and similar evils, the stability, size and method of construction of signs may be freely regulated; but against their ugliness the police power in this country may not be invoked: and of course it is impracticable to curb or remedy a widespread evil of this sort by eminent domain, with

[62] There is also much posting of advertisements on private property without the owner's consent. This is illegal without any statute forbidding it; and is expressly prohibited by statute in many states. "Sniping" or the indiscriminate posting of bills, regardless of law or right by irresponsible persons, is especially objectionable; and in New York City and elsewhere campaigns for the enforcement of the law against it, and the punishment of the offenders, have been launched, with excellent effect.

compensation. We may, however, freely tax advertisements on private property, and thus obtain revenue, and perhaps secure some decrease in their size and total area.[63]

[63] There are laws for the taxation of outdoor advertising not only in most foreign countries, but in the United States; see for instance General Statutes of Connecticut, Revision of 1918, ch. 168.

In New York State for many years efforts have been made to pass laws for the progressive taxation of outdoor advertising. In 1916 (Senate Introductory No. 1456) and again in 1917 (Assembly Introductory No. 792) there was introduced in the New York legislature a bill (which never passed) granting cities the power if they saw fit, to levy such taxes. This bill authorized cities:

"To levy and collect taxes upon advertisements, advertising signs and devices; upon the maintenance or public display thereof; upon structures and spaces for the public display thereof; upon the business of maintaining or publicly displaying advertisements or advertising signs or devices, including the business, whether as principal or as agent, of affixing advertisements, advertising signs or devices to realty or to structures or spaces thereon, and the business of owning, buying, selling or dealing in, interests in real estate for such public display; or upon any real estate or interest therein, within the limits of the city, used or intended for the public display of advertisements, advertising signs or devices, on account of such use or intended use.

"The rate of such tax may be made to vary progressively in amount or in rate with the size of any such advertisement, sign, device, structure or space or its position or location or its prominence or with relation to any circumstance relevant to its value as an advertisement."

The advocates of taxation of outdoor advertising criticised the above bill because it did not provide for the taxation of such advertising outside, as well as within, the limits of cities. Neither villages and towns nor counties in New York State have the governmental machinery to take advantage of an act empowering them to frame and enforce tax measures. For this reason a bill imposing such a tax on such advertising throughout the state was drawn. This bill, introduced for a number of years but never passed, was in form the enactment of an additional article to the New York State tax law. The bill introduced in 1922 (Senate Int. No. 555, print number 1652) given in full below, is practically the same as in former years except for the omission of a portion of sec. 403 of the bill of 1921. For the information of the student this portion has been inserted, in brackets in the corresponding section (423) of the 1922 bill.

ARTICLE XVIII

Taxes on Out-of-Door Advertisements and Advertising Devices

Section 420. Tax on out-of-door advertising.
421. Definitions; application of article.
422. Exemption from tax.
423. Rate of tax.
424. Annual tax; when due; to whom paid.
425. Computation of taxable area.
426. Application for tax receipt; statement of tax due.
427. Changes in advertising structures.
428. Identification plate or label.
429. Disposition of tax.

Outdoor Advertising in Residential Neighborhoods.—Billboards in residential neighborhoods are less profitable than

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Section 430. Removal of unauthorized advertisements; penalties for unauthorized display or removal of notices.
431. Designation of officers for enforcement of article.
432. Duties of state board of tax commissioners.

Sec. 420. Tax on out-of-door advertising. There is hereby imposed a tax at the rate hereinafter prescribed on out-of-door advertisements and advertising devices, now maintained or hereafter erected, displayed and maintained in the cities, villages and towns of the state, and such tax shall be assessed, paid and applied, and such advertisements and advertising devices shall be regulated and controlled as provided in this article.

Sec. 421. Definitions; application of article. 1. Advertisements or advertising devices made the subject of taxation and regulated as provided in this article, mean and include the out-of-door public display of any advertisements or advertising devices painted, printed, pasted, posted on, or otherwise affixed to, any building, billboard or structure of any kind on real property.

2. The tax imposed by this article on out-of-door advertising shall be deemed to be imposed with reference to each separate billboard or other advertising structure, or in case of such advertisement on the roofs, wall or sides of a building, with reference to each separate surface occupied with advertising matter, for the time for which the tax is paid, whether the advertisement displayed on such billboard or structure or in said space shall be the same for the period for which the tax is paid, or shall be changed from time to time.

3. The tax hereby imposed and the provisions of this article shall also apply to advertisements or advertising devices maintained and displayed on any billboard or other structure, wall, fence or railing,* erected or constructed in or upon any public street or highway or other public place, and the owner or lessee of any such structure, wall, fence or railing shall be deemed to be the owner or lessee of real property for the purposes of this article:

Sec. 422. Exemption from tax. There shall be excepted from and not taxable under this article.

1. Signs, announcements or devices advertising goods manufactured, or the business conducted, or a performance given upon the premises, or giving the name of the person, firm or corporation manufacturing the goods or conducting the business or giving the performance, or stating the location of the premises or of other places of business of the occupant. Except in the case of the owner or the lessee of the entire parcel of real property or building, the exceptions of this paragraph shall apply only to that portion of the property or building occupied by the business to which the sign, announcement or device relates.

2. The name or address of any building and of any person doing business therein put upon said building; notices upon any real property stating that the property is for sale or rent; danger or cautionary notices relating to the premises; advertisements or notices required by law or in any legal proceedings or put up by public authority.

3. Signs containing only (a) the name of the adjacent highway, or (b) warning of the condition of or dangers of travel on a highway, or (c) the distance or direction of any city, village or public place, or (d) the name of any automobile association or club, or board of trade or similar

* The words "platform or station" in bill as introduced (No. 555) stricken out in this print number.

in the more crowded business sections; and are more objectionable there. They are usually erected on vacant lots; and by

civic organization erecting such signs, or (e) either or both of such designations.

4. Notices of any railroad or other transportation or transmission company necessary for the direction or information or safety of the public or announcing the name of any station or office of such company.

5. Signs or advertisements or advertising devices (a) maintained and displayed inside a building, or (b) within a show window actually and chiefly used for the display of merchandise of the class or character of the articles described in the advertisement, and notices so displayed announcing a lecture or entertainment not a professional theatrical performance.

6. Signs or advertisements or advertising devices maintained and displayed on or in any car, station, subway or structure of a corporation subject to the provisions of the Public Service Commission Law.*

Sec. 423. Rate of tax. 1. The tax herein imposed shall be ten cents for each square foot of the area of the advertisement or advertising device to which it shall apply, computed as hereinafter provided.

[1. The tax herein imposed shall be paid for each square foot of the area of the advertisement or advertising device to which it shall apply, computed as hereinafter provided.

2. The rate of tax imposed on advertisements and advertising devices subject to tax as herein provided shall be as follows:

a. In a borough in a city of the first class having by the last state census a population of seven hundred thousand or more, such tax for the first nine square feet shall be at the rate of sixty cents a square foot, and for the next nine square feet or any portion thereof at the rate of ninety cents a square foot, and for the next nine square feet or any portion thereof and for all in excess of such area at the rate of one dollar and twenty cents a square foot.

b. In a borough in a city of the first class having a population of less than seven hundred thousand, and in any other city of the first class, such tax for the first nine square feet shall be at the rate of fifty cents a square foot, and for the next nine square feet or any portion thereof at the rate of seventy-five cents a square foot, and for the next nine square feet or any portion thereof and for all in excess of such area at the rate of one dollar a square foot.

c. In all cities of the second and third classes, such tax for the first nine square feet shall be at the rate of forty cents a square foot, and for the next nine square feet or any portion thereof at the rate of sixty cents a square foot, and for the next nine square feet or any portion thereof and for all in excess of such area at the rate of eighty cents a square foot.

d. In towns and villages outside of cities, such tax for the first nine square feet shall be at the rate of twenty-five cents a square foot, and for the next nine square feet or any portion thereof at the rate of forty cents a square foot, and for the next nine square feet or any portion thereof and for all in excess of such area at the rate of sixty cents a square foot.

3. In case of an advertisement or advertising device maintained and displayed in or upon a station or structure of a subway, elevated or other rapid transit road, street railroad or railroad, the rate for each square foot of surface of such advertisement or advertising device, computed as

* This paragraph, not in original bill (No. 555), was inserted in this print number.

giving the street as a whole an ugly appearance, affect the value of neighboring real estate, just as they render it less agreeable

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hereinafter provided, shall be as follows: In cities having a population of one million or over, one dollar; in other cities of the first class, seventy-five cents; in cities of the second class, fifty cents; and in all other places, thirty cents. If the area of such advertisement or advertising device, computed as hereinafter provided, shall exceed twenty square feet, such rate shall be doubled; if such area exceed forty square feet, the rate shall be trebled; and the rate for the entire surface shall progress in like manner for each twenty square feet of surface of the advertisement.]

Sec. 424. Annual tax; when due; to whom paid. The tax imposed by this article shall be for the calendar year beginning January first and shall be payable in advance. The tax imposed upon advertisements and advertising devices taxable under this article maintained when this act takes effect, and upon advertisements and advertising devices erected, maintained and displayed after January first in any year, shall be computed by monthly parts and shall be payable for as many twelfths as there are months or parts of months remaining in the calendar year for which the tax is imposed, but not for less than three months. The minimum tax for any period shall be one dollar.

The tax hereby imposed shall be assessed and collected in a city by the mayor thereof or by some officer to be designated or appointed by him; in a village by the president thereof or by some officer designated or appointed by him; and in the portion of a town outside a city or village by the supervisor thereof.

Sec. 425. Computation of taxable area. The number of square feet in any advertisement or advertising device shall be computed by measuring its longest horizontal and vertical dimensions, so that the area taxed shall be a rectangle, whether or not the entire space is covered by the advertisement or device. In case of an advertisement or advertising device which is affixed to a structure erected on supports above the ground or above the roof of a building, the area shall be computed by measuring the smallest rectangle in which it is possible to include all parts of such structure.

Sec. 426. Application for tax receipt; statement of tax due. 1. The owner or lessee of any real property desiring to maintain and display, or to permit to be maintained and displayed, upon such real property any taxable advertisement or advertising device or to increase the dimensions of one upon which a tax has been paid, shall make application in writing to the officer of the city, village or town in which such real property is located to whom the tax is required to be paid. Such application shall contain the name and address of the applicant, the location of the property, and shall state the dimensions of the advertisement, advertising device or advertising structure, so that the taxable area thereof may be ascertained. There shall also be submitted with such application a plan showing the location of such advertisement, advertising device or advertising structure, and a brief description sufficient to identify and classify the same.

2. Upon receipt of such application and if satisfied that the statements therein contained are accurate and in sufficient detail, the officer to whom the application is made shall furnish a statement to the person applying, setting forth the amount of tax due and payable for maintaining such advertisement or advertising device or for the erection and maintenance thereof. Upon payment of the tax due, such officer shall issue a receipt

for residence. It is interesting to note in this connection that a recent court decision has held that in residential neighbor-

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therefor bearing an identifying number and stating the amount of the tax, the period for which it is paid and the location of the real property.

3. The officer to whom applications are made as herein provided shall keep an accurate record of such applications and of the tax receipts issued by him, specifying the identifying number thereof, the name of the applicant, the location of the real property, the description of the advertisement or advertising device and the amount of tax paid.

4. The officer whose duty it is to assess and collect taxes hereby imposed shall ascertain whether advertisements or advertising devices subject to tax hereunder are being maintained or displayed in the city, village or town in which he has jurisdiction, and if no application is made for the maintenance and display of such advertisement or advertising device, or if the application made is incomplete or unsatisfactory and the applicant neglects or refuses to correct or amend the statements therein, such officer shall estimate the area of such advertisement or advertising device and impose a tax thereon at the rate herein prescribed, according to his judgment and belief. Upon ascertaining and imposing such tax he shall give notice to the owner or lessee of the real property upon which such advertisement or advertising device is maintained and displayed and such tax shall be due and payable from the time of the service of such notice.

Sec. 427. Changes in advertising structures. If at any time the person who has paid a tax for the maintenance and display of any advertisement or advertising structure, space or device as provided in this article shall, during the term for which such tax has been paid, desire to enlarge or relocate the same upon the same premises, or make any structural changes therein, other than those incidental to the repair of the same or to changing the advertisement in the space thus occupied, for which the tax has been paid, he shall make a new application therefor stating also briefly the particulars of the old application and the amount of tax paid thereon, and if the tax payable upon the new advertising structure, space or device shall be greater than that upon the old deduction shall be made from the amount of such greater tax of whatever sum has been paid on such former application for the same period.

Sec. 428. Identification plate or label. Every taxable advertisement, advertising device or advertising structure shall have affixed thereto or painted thereon a plate or label in a form to be prescribed by the state tax commission, which shall legibly state the name of the person, firm or corporation maintaining such advertisement, advertising device or structure, and that the tax imposed upon such advertisement has been duly paid, and shall state the number of the tax receipt issued therefor. The absence of such plate or label shall be prima facie evidence of the nonpayment of the tax. The mayor of the city, the president of the village or the supervisor of the town, in which such advertisement or advertising device or structure is being maintained and displayed, or any authorized representative of such officer or any peace officer when duly designated by such officer, may inspect any such advertisement, advertising device or structure at any reasonable hour during the day time, and for such purpose may enter the premises upon which the same is erected or maintained or to which it is attached.

Sec. 429. Disposition of tax. The taxes imposed by this article shall when collected be paid into the general fund of the city, village or town in which the taxable advertisement or advertising device is located, and

hoods the city may require the permission of neighboring real estate owners before issuing a permit for the erection of a bill-

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shall be used and applied for the same purpose as other general funds of the city, village or town.

Sec. 430. Removal of unauthorized advertisements; penalties for unauthorized display or removal of notices. 1. If an advertisement or advertising structure or device shall be maintained and displayed upon real property without the payment of the tax hereby imposed, the officer charged with the collection of the tax shall notify the owner or lessee of such real property of the amount of tax due by serving notice of such amount upon such owner or lessee, in person or by mail, to his last known address, or if such address is unknown, by posting such notice upon such advertisement or advertising device. If such tax is not paid or such advertisement is not removed or obliterated within thirty days after such notice, the mayor of the city, the president of the village or the supervisor of the town may bring suit against the owner or lessee of such real property for the recovery of such tax, together with the penalties imposed as provided in this section.

2. No taxable advertisement or advertising structure or device shall be erected, maintained or displayed upon any real property, nor shall its dimensions be increased unless the tax imposed by this article shall have been paid. The owner or lessee of any real property permitting an advertisement or advertising device to be maintained or erected upon such real property without the payment of the tax imposed by this article shall be liable, in addition to the tax, to a penalty of twice the amount of such tax, to be collected by suit by the mayor of the city, president of the village or supervisor of the town in which such real property is located.

3. No person shall be taxable or liable to a penalty on account of an advertisement or advertising structure or device maintained and displayed upon his property without his knowledge, or for which he receives no compensation, provided he removes the same within thirty days after he has received notice that the tax on such advertisement or advertising structure or device has not been paid.

4. Any person who shall erect, maintain, post, paint or otherwise attach or affix any taxable advertisement or advertising structure or device upon any real property without the consent of the owner or lessee thereof, or shall remove or deface or destroy, without reasonable cause therefor, any notice affixed under the provisions of this section or any identification plate or label attached to such taxable advertisement, advertising structure or device, shall be guilty of a misdemeanor.

5. Nothing in this article shall be construed to compel the owner or lessee of a building or other structure on which a sign or advertisement has heretofore been painted or otherwise displayed or attached in such manner as not to be removable or obliterated without injury to the building or structure and without expense to such owner or lessee, to pay any tax on account of such sign or advertisement or to remove or obliterate the same, unless such owner or lessee is the person or corporation, or the agent of the person or corporation, whose goods, wares, merchandise or service are advertised by such sign or advertisement.*

Sec. 431. Designation of officers for enforcement of article. A mayor of a city, president of a village or supervisor of a town may designate an existing city, village or town officer or may appoint an officer to perform the duties prescribed by this article. The compensation for the per-

* Par. 5, not in original bill (No. 555), was inserted in this print number.

formance of such duties shall be fixed and paid in the same manner as for other city, village or town officers. If the duties hereby required to be performed are delegated to an existing officer, additional compensation may be allowed therefor in like manner.

Sec. 432. Duties of state tax commission. The state tax commission shall prescribe the form of applications, tax receipts, plates and labels required to be used under this article, and shall have the same powers and duties as to the enforcement of the provisions of this article as are imposed upon it in relation to the assessment and taxation of real property. Such board is hereby authorized to make rules to secure the proper application and enforcement of the provisions of this article.

The Mayor's Billboard Advertising Commission of the City of New York, 1913 (second printing, 1915) in a proposed bill in other respects much like the one given above, provides for a progressive rate of taxation. The Committee explains that "the rate inserted in par. 2 as the unit is the rate suggested by the Commission on New Sources of City Revenue. The rate in par. 6 is merely tentative."

The Section in question (page 89 of their report) is as follows:

"1. The tax herein provided for shall be a progressive tax increasing in multiples of the respective units of taxation as hereinafter defined and shall be paid for each square foot of the area of the advertisement to which it shall apply, computed as hereinafter provided.

"2. In the case of all advertisements subject to tax hereby, except such advertisements as shall be parts of or erected or displayed in or upon a station or structure of a subway, elevated or other rapid transit road, street railroad or railroad, the tax unit shall be two one-hundredths of one per cent. per annum of the value per front foot of the lot occupied by the advertisement according to the last preceding assessment. Where such lot or parcel fronts on more than one street and no front foot value is given by the tax department upon the minor street or streets, the tax unit for the minor street or streets shall be 75 per cent. of the unit for the major street. But in no case shall the tax unit be less than fifty cents per square foot in cities having a population of 1,000,000 or over, nor less than thirty cents per square foot in cities of the first class, nor less than twenty cents per square foot in cities of the second class, nor less than ten cents per square foot elsewhere.

"3. If the superficial area of such an advertisement, computed as hereinafter provided, shall not exceed one hundred square feet the rate per square foot shall be the tax unit. If such area is greater than one hundred square feet, but does not exceed two hundred square feet, the rate shall be twice such tax unit. If such area is greater than two hundred square feet, but does not exceed three hundred square feet, the rate shall be three times such tax unit; and the rate shall progress in like manner for each additional one hundred square feet of superficial area of such advertisement.

"4. If no part of the advertisement shall be more than ten feet above the curb level the rate per square foot shall be the tax unit or multiple thereof computed according to the last preceding paragraph. If any part of the advertisement is more than ten feet above the curb level but not more than twenty feet the rate shall be twice such tax unit or multiple thereof; if more than twenty feet but not more than thirty feet the rate shall be three times such tax unit or multiple thereof; and the rate shall progress in like manner for each additional ten feet in height above the curb level to or at which the highest part of the advertisement shall be erected or shall occupy; and the rate to be paid for the whole advertisement shall be the highest rate to which any part of the advertisement is subject.

board;[64] thus making their location in such neighborhoods dependent upon the consent of such owners, as in the case of saloons, etc. Still more important is the fact that outdoor advertising, which cannot be legally regulated anywhere (except, to some extent in Massachusetts by Constitutional Amendment[65]) because it is ugly, can, under zoning regulations, be altogether excluded from residential districts because it is out of place. This may be done[66] by passing a special ordinance zoning a city as to advertising, or under a general building zone ordinance regulating the construction and use of structures of all kinds; for advertising structures are business structures, excluded from residential neighborhoods as such, without being otherwise mentioned; and the New York regulation, and others which, like it, do not specifically mention

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"5. Every advertisement which is illuminated at night by lights attached or appurtenant thereto, but not self-illuminating signs on skeleton frames in which the picture or device is itself made with lights, shall pay double the rate as computed according to the last two preceding paragraphs.

"6. The tax unit per annum of advertisements which are parts of or erected or displayed in or upon a station or structure of a subway, elevated or other rapid transit road, street railroad or railroad shall be, for each square foot of surface of such advertisement, computed as hereinafter provided, as follows: In cities having a population of 1,000,000 or over, one dollar; in other cities of the first class, fifty cents; in cities of the second class, twenty-five cents; and in other places ten cents. If the superficial area of such an advertisement, computed as hereinafter provided, shall exceed ten square feet the rate shall be doubled; if it exceed twenty square feet the rate shall be trebled; and the rate for the whole surface shall progress in like manner for each additional ten square feet of surface of the advertisement.

"7. Where a single advertising structure shall have more than one surface or plane of display, all surfaces or planes of display shall be treated as one surface which are visible from any one point in a street or other public place, for the purpose of fixing the area of such sign."

Another bill, prepared by Messrs. Heydecker and Pleydell, and referred to in the Report of the New York Committee on New Sources of Revenue, was published in the New York "City Record" for January 24, 1913, and subsequently reprinted in pamphlet form.

[64] Cusack Co. v. Chicago, 267 Ill. 344, affirmed 242 U. S. 526 (1917). The decision cites the ordinance. Similar ordinances have been passed in other cities; see for instance the Cincinnati ordinance, No. 25—1919, passed January 28, and the Toledo ordinance, No. 1839, passed May 17, 1920.

[65] See p. 395, note 22.

[66] As in Los Angeles; see ordinance No. 38, 315, N. S., approved June 25, 1918. The ordinance is reprinted in the report of the American Scenic and Historic Preservation Society for 1919, p. 187. See also the San Francisco ordinance (No. 4059, N. S.) passed Feb. 16, 1917.

billboards or outdoor advertising in any way, have been so interpreted by officials acting under them.[67] Later ordinances do, in some cases,[68] specifically mention such structures, and class them as business structures.[69]

Outdoor Advertising in France.—In our efforts to curb the excesses of outdoor advertising on private property exposed to public view, we may gain encouragement and instruction

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[67] Roof signs are subject to the height and setback restrictions of the building zone resolution; Board of Standards and Appeals, New York City, Bulletin of Oct. 11, 1916, and Rules, 1920, p. 45.

[68] As for instance that for Lakewood, Ohio.

[69] An indirect method by which to a considerable extent, advertising on the street walls of buildings in cities can legally be regulated on æsthetic grounds, has been suggested in the report of the Mayor's Billboard Advertising Commission of New York (printed August 1, 1913, reprinted with a few additions July, 1915; see p. 42 of that report). City streets are held by cities in trust for street purposes. Cities may grant abutters rights in the streets (by revocable license only) or refrain from granting them as they see fit. Universally cities do allow encroachments, such as projecting steps, cornices, ornamental columns, balconies, etc. As the city may withhold this privilege, it may attach conditions to it. This is the law in other cases (People v. Rosenheimer, 209 N. Y. 115, 1913; Lewis Publishing Co. v. Morgan, 229 U. S. 288 (1913), People ex rel. Beinert v. Miller, 188 Appellate Division (N. Y.) 113 (1919), upholding an order of the Board of Appeals of New York City, in their discretion allowing a stable to be erected with one wall on a residential street, on condition that there was no opening in that wall) and would undoubtedly be so in this one. The report accordingly recommends that the privilege of encroaching to any extent, in any case, on the public highways be made conditional upon the observance of such regulations on advertising upon the building encroaching, as the city sees fit to make. "Few owners," . . . the report rightly observes, "are likely to surrender lightly their present privilege of extending to some degree beyond the building line." In this connection it is interesting to note that it is on the principle here invoked that the Board of Appeals, in granting exceptions to the zoning resolution in New York City, constantly requires the petitioner to agree to construct his building in ways which improve its appearance and make it more acceptable to neighbors for this reason; but being imposed for æsthetic reasons, would not, as independent provisions, be valid. See also the statutes of New Jersey for 1895 (ch. 28, P. L., p. 88) and 1898 (ch. 191, P. L. 439) in which the state, owning lands under navigable water, and granting them to such parties and on such terms as it sees fit, directs its agents not to part with such lands in ways which will deface the Palisades of the Hudson River. In 1922 the statute was further amended (P. L. 1922, p. 159, ch. 87) by adding a definition of "the Palisades."

See also in this connection Oppenheim Apparel Corp. v. Cruise, and three other cases reported in the New York Law Journal, March 2, 1922 (p. 1914) sustaining a New York City ordinance prohibiting certain "illuminated signs" on certain streets. Such signs project beyond the property line (Ordinances, ch. 23, art. 16, sec. 215, par. 3) and a careful reading of the decision shows that it was based upon that fact.

from foreign experience. France has never attempted to prohibit signs and posters in all parts of her cities. Disfigurement not exceeded in all the world, one is inclined to think, may be seen in many places within the limits of any of her cities, not excluding Paris, the most beautiful of them all. Instead she forbids all advertising on [70] or within a certain distance of structures and natural sites [71] of historical and artistic importance listed under her classification statutes of 1887 and 1913, already referred to.[72] In certain localities, also, advertising is made a government monopoly under the statute giving the authorities power over publicity and the press,[73] the municipalities erecting small tasteful kiosks and forbidding all posters elsewhere. In France, also, outdoor advertising is heavily taxed, the principle of a rate increasing progressively with the size of the advertisement, being adopted under a late statute.[74]

Outdoor Advertising in England.—In England the law on this subject was until recently like our own, and the situation worse. Comfortable and convenient as they are, nothing could be uglier, for instance, than the London busses and the London underground stations, nothing more confusing than the mass of signs which make it difficult to discover the destination of a bus or the name of a station.

In 1907 England passed her "Advertisements Regulation Act" [75] under which any local authority may make bye-laws:

"(1) For the regulation and control of hoardings and similar structures used for the purpose of advertising when they exceed twelve feet in height;

"(2) For regulating, restricting, or preventing the exhibition of advertisements in such places and in such manner, or by such

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[70] Passed Jan. 27, 1902; *Bull. des lois,* XII[e] Sér., Bull. 2348, No. 41492, p. 1878. The title of the act is "Law Modifying Art. 16 of the Law of July 29, 1881, with regard to the Press."

[71] Law of April 20, 1910, *Bull des lois,* Nouv. Sér., Bull. 32, No. 1481 p. 1123.

[72] In Italy municipalities may prohibit advertisements that are on or near public buildings or monuments, or that deface the locality. Law of Public Security of 1889, Art. 65. See *Raccolta ufficiale delle leggi e dei decreti,* Vol. 91, No. 5888 decies.)

[73] Law of July 29, 1881. *Bull. des lois,* XII[e] Sér., Bull. 637, No. 10850.

[74] Law of July 12, 1912, *Bull. des lois,* Nouv. Sér., No. 4336, p. 1964.

[75] 7 Edw. VII, ch. 27.

means, as to affect injuriously the amenities of a public park or pleasure promenade, or to disfigure the natural beauty of a landscape."

Bye-laws made under this act may apply either to the whole of the area of the local authority or to any specified part of it and must be confirmed by the Home Secretary who must consider the objections of those likely to be affected. The local authorities may also under sec. 19 of the Ancient Monuments Act, already quoted,[76] prohibit advertisements on or near any monument or structure of historic, traditional, artistic or architectural public interest, as may be done in France. New "sky signs" on the roofs of buildings were also forbidden in England in 1907 [77] as they had been previously in London.[78]

Outdoor Advertising in Germany.—In almost if not quite all the German States, there are now statutes under which outdoor advertising may be forbidden if it disfigures a structure, street, square, or mars the beauty of a city or country view. Such statutes were to be found prior to 1907 [79] but have become much more numerous and strict since about that time.[80]

Outdoor advertising is also controlled under the various statutes with regard to publicity and the press. In many parts of Germany this advertising is a profitable government monopoly conducted, as in France, with due regard to the appearance of public places.

The æsthetic regulation of private property exposed to

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[76] P. 399 above.

[77] Public Health Acts Amendment Act, 1907 (7 Edward VII, ch. 53), sec. 91.

[78] See Cubitt, *Building in London*, 1911, p. 180, citing the London Building Act, 1894; 57 and 58 Vict. ch. 213, Part XII.

[79] See, for instance, the Prussian statute of June 2, 1902; sec. 90 of the Saxon Building Ordinance of July 1, 1900, as amended May 20, 1904.

[80] Outdoor advertising is regulated under sec. 3 of the Prussian Statute of 1907, and sec. 1 of the Saxon Statute of 1909, already cited; in Baden by virtue of the "Polizeistrafgesetzbuch" of October 31, 1863 (Reg. Bl. p. 439), sec. 130, as amended by the law of August 20, 1904 (Ges. u. V. O. Bl., p. 397) and ib. sec. 116, by virtue of which secs. 33-35 of the General Building Ordinance were issued; in the Duchy of Anhalt, by virtue of sec. 64 of the Building Ordinance already cited above; in Württemberg by virtue of art. 98, par. 3 of the Building Ordinance; in Bavaria by virtue of art. 22, b., par. 11 of the Polizeistrafgesetzbuch, as amended July 6, 1908; see note 3 in edition of Englert (Munich 1912, Beckh'sche Verlagsbuchhandlung) of the Building Ordinance for Bavaria, p. 183.

public view is important because public beauty is both an asset and an amenity. This the citizen of continental Europe, where æsthetic considerations have long prevailed, fully recognizes. The Parisian knows that the beauty of his city attracts multitudes of tourists to it every year, to his net financial profit; and he also appreciates to the full its æsthetic charm, and will allow no one, with his consent, to deface it. Of the two motives for his intense regard for the appearance of his city, who can doubt that the love of its beauty is the stronger? However that may be, the general recognition of the worth of beauty is everywhere essential before popular support for provisions to secure it and preserve it can be obtained on any ground. Our only hope in this country of such a recognition is in the gradual increase in civic pride and taste. It is, therefore, encouraging to read in McQuillin's book on municipal corporations [81] that in the opinion of the writer of this standard work for the practical lawyer:

"It is certain that much of the legislation [in the United States] of recent date, particularly during the past two decades, has been induced largely by æsthetic and artistic considerations, and this desire to render the urban centers more attractive has found a firm lodgment in the popular mind. It is destined to increase with the years, and in the development of the law in this respect courts will be inclined to give a broader interpretation to such regulations, and finally sanction restrictions imposed solely to advance materially attractiveness and artistic beauty."

Note F

Note 1. The French Law for the Protection of Places of Natural Beauty [82]

Art. 1. In each department there shall be formed a commission with relation to places of natural beauty. This commission shall be composed of the prefect* (four other officials and five laymen distinguished in art, science and letters).

Art. 2. This commission shall make a list of lands the preserva-

* Summarized.

[81] Sec. 929.

[82] Passed April 21, 1906; to be found in *Bulletin des lois*, 1906, XII[e] Sér. Bull. 2736, p. 735 (No. 47713).

tion of which on account of their artistic or picturesque character would be of general interest.

ART. 3. The owners of the lands designated by the commission shall be asked to agree not to destroy or change the condition of these places without the special authority of the commission and the consent of the Minister of Public Instruction and Fine Arts.

If this agreement is made, the property will be classified by decree of the Minister of Public Education and Fine Arts.

If the owner refuses to make this agreement, the commission shall notify the department and the commune within which the property is situated. Declassification may be effectuated by the same method and under the same conditions as classification.

ART. 4. The prefect on behalf of the department, or the mayor on behalf of the commune, may under the law of May 3, 1841, expropriate the properties designated by the commission as susceptible of classification.

ART. 5. After the establishment of the servitude[83] of classification every change of the locality without the authority mentioned in art. 3, shall be punished by a fine of from one hundred francs (100 f) to three thousand francs (3000 f).

Article 463 of the Penal Code is applicable.

The prosecution shall be made on the complaint of the commission.

ART. 6. This law shall apply to Algeria.

No. 2. THE FRENCH LAW FOR THE PROTECTION OF PLACES AND OBJECTS OF HISTORIC AND ARTISTIC INTEREST[84]

CHAPTER I

REAL PROPERTIES[85]

ART. 1. Real properties, the conservation of which possesses, from the point of view of history or of art, a public interest, are classified as historic monuments in whole or in part in the care of

[83] Known in our law as "easement."

[84] Entitled "Law with Regard to Historic Monuments"; passed December 31, 1913, superseding former laws; to be found in the *Bulletin des lois* for 1913, Bull. 120, p. 3416 (No. 6459). The translation is that of the American Scenic and Historic Preservation Society in its report for 1914, p. 306.

[85] The French word thus rendered is *"immeubles."* It means literally things which cannot be transported and includes lands and buildings which in their nature are immovable. In a general way it means real estate as distinguished from *"meubles,"* movables, or personal property. But on account of the awkwardness of using the words "real estate" or "real estates" in such expressions as "the destruction, pulling down, mutilation, injury or removal of a classified real estate" (see art. 34), we have used instead the words "real property" or the word "property"

the Minister of Fine Arts according to the provisions established by the articles following.

Included among the real properties susceptible of being classified according to the terms of the present law are megalithic monuments, prehistoric stations or deposits and real property the classification of which is necessary to isolate, separate or make safe a property classified or proposed for classification.

From the day when the Administration of Fine Arts gives notice to the proprietor of his proposition for classification, all the effects of classification apply in full force to the property. They cease to apply if the decision to classify is not reached within six months from this notification.

Every order or decree which shall pronounce a classification after the promulgation of the present law shall be transcribed, under the direction of the Administration of Fine Arts, to the Bureau of Mortgages of the locality of the classified property. This transcription shall not be subject to any collection or profit of the Treasurer.

ART. 2. There shall be considered as regularly classified, after the promulgation of the present law, 1st, the properties inscribed in the general list of classified monuments published officially in 1900 by the Direction of Fine Arts; 2nd, the properties, whether comprised or not in this list, which have been made the object of orders or decrees of classification conformably to the terms of the law of March 30, 1887.

Within a period of three months the list of properties considered as classified before the promulgation of the present law shall be published in the Official Journal. There shall be drawn up, for each of said properties, an extract from the list, reproducing all that which concerns it; this extract shall be transcribed to the Bureau of Mortgages of the locality of the property, under the direction of the Administration of Fine Arts. This transcript shall not be subject to any collection or profit of the Treasurer.

The list of classified properties shall be kept open; and re-edited at least every ten years.

There shall be drawn up, furthermore, within a period of three years, a supplementary inventory of all buildings or parts of buildings

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alone in this translation. While the significance of *"immeuble"* is frequently that of "building," yet the word *"bâtiment"* does not occur in the law and the word *"edifice"* only two or three times. In those cases, and those only, we have used the word "building." It should be understood, therefore, that the word "property" in this translation means immovable property or real estate. There is also in French an *"immeuble fictif"* or fictitious real estate which consists of a movable object which has become affixed to, and therefore a part of, real property. It is called *"immeuble par destination."* This we have rendered as "fixture." (See art. 14.)

public or private which, while not justifying a demand for immediate classification, possess nevertheless an archæological interest sufficient to render desirable their preservation. Inscription in this list shall be notified to the proprietors and shall impose upon them the obligation not to proceed with any alteration of the inscribed property without having notified the prefectoral authority of their intention five days in advance.

ART. 3. Property belonging to the State is classified by order of the Minister of Fine Arts, in case of accord with the Minister under whose authority the said property is placed.

In the contrary case, the classification is pronounced by a decree in Council of State.

ART. 4. Property belonging to a department, to a commune or to a public establishment is classified by an order of the Minister of Fine Arts, if it has the consent of the proprietor and the approval of the Minister under the authority of whom it is placed.

In case of disagreement, the classification is pronounced by an order in Council of State.

ART. 5. Property belonging to any person other than those enumerated in articles 3 and 4 is classified by order of the Minister of Fine Arts, if the proprietor consents. The order determines the conditions of classification. If there is a controversy about the interpretation or execution of this act, it is settled by the Minister of Fine Arts, with recourse to the Council of State established for litigations.

In default of the consent of the proprietor, the classification is pronounced by the Council of State. The classification may be ground for the payment of an indemnity proportionate to the injury which may result to the proprietor from the application of the limitation of classification established by the present paragraph. The claim must be presented within six months from the date of the notification of the decree of classification; this act will inform the proprietor of his eventual right to an indemnity. Litigations relative to the indemnity are adjudged in first instance by the Justice of the Peace of the canton. If there is an appraisal, there shall be appointed but one expert. If the amount of the claim exceed 300 francs, there shall be ground for appeal to the civil tribunal.

ART. 6. The Minister of Fine Arts, in conforming to the provisions of the law of May 3, 1841, may always prosecute in the name of the State the expropriation of a property already classified or proposed for classification by reason of the public interest which it possesses from the point of view of history or art. The departments and the communes have the same power.

The same power is open to them with respect to properties the acquisition of which is necessary in order to isolate, separate or make safe a property classified or proposed for classification.

In these various cases, the public use is declared by a decree in Council of State.

ART. 7. From the day when the Administration of Fine Arts notifies the proprietor of an unclassified property of his intention to prosecute the expropriation, all the effects of classification apply with full force to the said property. They cease to apply if the declaration of public use does not occur within six months of this notification.

When the public use has been declared, the property may be classified without other formalities by an order of the Minister of Fine Arts. In default of an order of classification, it continues nevertheless provisionally subject to all the effects of classification, but this subjection ceases entirely if within three months from the declaration of public use the administration does not seek to obtain a judgment of expropriation.

ART. 8. The effects of classification follow the classified property into whatever hands it passes.

Whoever conveys a classified property is obliged to notify the purchaser of the existence of the classification.

Every conveyance of a classified property must, within fifteen days from its date, be notified to the Minister of Fine Arts by the person who has consented to it.

Classified property which belongs to the State, to a department, to a commune or to a public establishment cannot be sold except after the Minister of Fine Arts has been requested to present his observations; he must present them within a period of 15 days after notification. The Minister may, within the period of five years, declare null a conveyance consented to without the observance of this formality.

ART. 9. Classified property shall not be destroyed or removed, even in part, nor be the object of a work of restoration, repair or any change whatever, if the Minister of Fine Arts has not given his consent.

The works authorized by the Minister are executed under the surveillance of his administration.

The Minister of Fine Arts may always execute under the direction of his administration and at the expense of the State, with the co-operation of the parties interested, the works of repair or maintenance which are judged indispensable for the conservation of classified monuments not belonging to the State.

ART. 10. To ensure the execution of urgent works of consolidation among classified properties, the Administration of Fine Arts, in default of friendly accord with the proprietors, may, if it is necessary, authorize the temporary occupation of these properties or neighboring properties.

This occupation is ordained by a prefectoral order previously

notified to the proprietor, and its duration shall not in any case exceed six months.

In case of damage, it shall be ground for an indemnity which is regulated by the conditions provided by the law of December 29, 1892.

ART. 11. No property classified or proposed for classification shall be included in an inquest[86] for the purpose of expropriation for public use except after the Minister of Fine Arts shall have been asked to present his observations.

ART. 12. No new construction shall be added to a classified property without a special authorization of the Minister of Fine Arts.

No one may acquire any right by prescription in a classified property.

Easements[87] in classified properties which may cause injury to monuments are not permissible.

No easement may be established by covenant in a classified property except with the consent of the Minister of Fine Arts.

ART. 13. The total or partial declassification of a classified property is pronounced by a decree in Council of State, either on the proposal of the Minister of Fine Arts or at the request of the proprietor. The declassification is notified to the interested parties and transcribed to the Bureau of Mortgages in the locality of the property.

CHAPTER II

MOVABLE OBJECTS[88]

ART. 14. Movable objects, whether properly called movables (*meubles proprement dits*) or fixtures (*immeubles par destination*) the conservation of which, from the point of view of history or art, possesses a public interest, may be classified by the direction of the Minister of Fine Arts.

The effects of classification continue with respect to classified fixtures which again become movable property so called.

ART. 15. The classification of movable objects is pronounced by an order of the Minister of Fine Arts when the object belongs to the State, to a department, to a commune or to a public institution. It is notified of the interested parties.

The classification becomes definitive if the Minister under whose jurisdiction the object is or the public body owning it has not objected within a period of six months from the date of the notice

[86] Public hearing.

[87] "Servitudes."

[88] "*Objets mobiliers*," or personal property, as distinguished from real estate. See note on page 423 preceding.

which has been given them. In case of objection it shall be determined by a decree in Council of State. Always, from the date of the notification, all the effects of classification are applied provisionally and in full force to the object.

ART. 16. Movable objects belonging to all persons other than those enumerated in the preceding article may be classified, with the consent of the proprietor, by an order of the Minister of Fine Arts.

In default of the consent of the proprietor, the classification cannot be pronounced except by a special law.

ART. 17. There shall be drawn up, under the direction of the Minister of Fine Arts, a general list of classified movable objects, arranged by departments. A copy of this list, kept open, shall be deposited with the Minister of Fine Arts and the prefecture of each department. It shall be communicated under conditions determined by a regulation of public administration.

ART. 18. All classified movable objects are imprescriptible. Classified objects belonging to the State are inalienable.

Classified objects belonging to a department, commune, public institution or institution of public utility cannot be alienated except with the authorization of the Minister of Fine Arts and in the forms provided by the laws and regulations. Ownership therein cannot be transferred except to the State, to a public person or to an institution of public utility.

ART. 19. The effects of classification follow the object into whatever hands it passes.

Every individual who parts with a classified object is required to make known to the acquirer the existence of the classification.

Every conveyance must, within fifteen days from the date of its accomplishment, be notified to the Minister of Fine Arts by the party who consents to it.

ART. 20. An acquisition made in violation of article 18, second and third paragraphs, is null. Actions in nullification or in the prosecution of a claim may be instituted at any time as well by the Minister of Fine Arts as by the original proprietor. They are instituted without prejudice to any claims for damages which may be made either against the contracting parties collectively responsible or against the public officer who has given his consent to the alienation. When the illicit alienation has been consented to by a public person or an establishment of public utility, this action for damages is instituted by the Minister of Fine Arts in the name and to the profit of the State.

The acquirer or sub-acquirer in good faith from whose hands the object is demanded has the right of reimbursement of his price of acquisition; if the claim is exercised by the Minister of Fine Arts, he shall have recourse against the original vender for the entire

amount of the indemnity which he has given to pay the purchaser or sub-purchaser.

The provisions of the present article are applicable to objects lost or stolen.

ART. 21. The exportation of classified objects from France is prohibited.

ART. 22. Classified objects may not be altered, repaired or restored without the permission of the Minister of Fine Arts nor without the surveillance of his administration.

ART. 23. There shall be an examination of classified objects by the Administration of Fine Arts at least every five years.

Furthermore, the proprietors or holders of these objects are obliged when so required to exhibit them to the accredited agents of the Minister of Fine Arts.

ART. 24. The declassification of a classified object may be pronounced by the Minister of Fine Arts either of his own accord or on the demand of the proprietor. It is notified to the interested parties.

CHAPTER III

THE PROTECTION AND CONSERVATION OF HISTORIC MONUMENTS

ART. 25. The different services of the State, departments, communes, public establishments or establishments of public utility are required to assure the protection and conservation of classified movable objects of which they are the proprietors or depositories or with the care of which they are charged, and to take the necessary measures to that effect.

The expenses necessitated by these measures are, with the exception of the cost of construction or reconstruction, local obligations of the department or the commune.

In default of a department or a commune taking the measures considered necessary by the Minister of Fine Arts, it can be attended to by the decision of the same Minister of his own accord.

By reason of the expenses sustained by them for the execution of these measures, the departments and communes may be authorized to establish a visitation tax the amount of which shall be fixed by the Prefect after approval by the Minister of Fine Arts.

ART. 26. When the Administration of Fine Arts considers that the conservation or the security of a classified object belonging to a department, commune, or public establishment is in peril, and when the corporate owner, depository or party responsible for its care (*collectivité propriétaire, affectataire ou dépositaire*) either does not wish or is not able to take immediately the measures judged necessary by the Administration to remedy this state of affairs, the Minister of Fine Arts may order immediately at the expense of his admin-

istration the conservative measures, and also, in case of necessity, the provisional transfer of the object to a cathedral treasurer, if it relates to religion, and, if it does not, to a museum or other public place, national, departmental or communal, offering the desired guarantees of security, and as far as possible situated in the vicinity of its original location.

Within a period of three months from this provisional transfer, the conditions necessary for the protection and the conservation of the object in its original location shall be determined by a commission convened by the call of the Prefect, composed, 1st, of the Prefect, President *ex officio;* 2nd, of a representative of the Minister of Fine Arts; 3rd, of the departmental Archivist; 4th, of the Architect of Historic Monuments of the department; 5th, of a President or Secretary of a local historical, archæological or artistic society, designated as such for a period of three years by order of the Minister of Fine Arts; 6th, of the Mayor of the commune; 7th, of the Counsellor-General of the canton.

The corporate owner, depository or party responsible for its care (*collectivité propriétaire, affectataire ou dépositaire*) may at any time obtain the return of the object to its original location if it prove that the required conditions have been fulfilled.

ART. 27. The guardians of classified properties (*immeubles*) or objects (*objets*) belonging to departments, communes or public establishments shall be accepted and commissioned by the Prefect.

The Prefect is required to make known his acceptance or his refusal to accept within the period of one month. If the public person interested fails to nominate a guardian acceptable to the Prefect, the latter may appoint one of his own motion.

The amount of compensation of guardians must be approved by the Prefect.

Guardians cannot be discharged except by the Prefect. They must be sworn.

CHAPTER IV

EXCAVATIONS AND DISCOVERIES

ART. 28. When, in consequence of excavations, works or any act whatever, one has discovered monuments, ruins, inscriptions or objects interesting to archæology, history or art, on lands belonging to the State, a department, a commune or a public establishment or establishment of public utility, the Mayor of the commune must assure the provisional conservation of the objects discovered and immediately notify the Prefect of the measures taken.

The Prefect, as soon as possible, shall refer it to the Minister of Fine Arts who shall decide upon the definitive measures to be taken.

If the discovery takes place on the land of an individual, the

Mayor shall give notice of it to the Prefect. On the report of the Prefect, the Minister may prosecute the expropriation of the said land in whole or in part on the ground of public use, after the forms of the law of May 3, 1841.

CHAPTER V

PENAL PROVISIONS

ART. 29. Every violation of the provisions of paragraph 4 of article 2 (altering, without previous notice, a property inscribed in the supplementary inventory), paragraphs 2 and 3 of article 8 (alienation of a classified property), paragraphs 2 and 3 of article 19 (alienation of a classified movable object), and paragraph 2 of article 23 (exhibition of classified movable objects) shall be punished by a fine of from 16 to 300 francs.

ART. 30. Every violation of paragraph 3 of article 1 (effects of the proposition for the classification of a property), article 7 (effect of the notification of a demand for expropriation), paragraphs 1 and 2 of article 9 (alteration of a classified property), article 12 (new constructions, easements), or of article 22 (alteration of a classified movable object), of the present law, shall be punished by a fine of from 16 to 1500 francs without prejudice of an action for damages which may be instituted against those who shall have ordered the works executed or the measures taken in violation of said articles.

ART. 31. Whoever shall have alienated, knowingly acquired or exported a classified movable object in violation of article 18 or article 21 of the present law shall be punished by a fine of from 100 to 10,000 francs and an imprisonment of from six days to three months, or by only one of these two punishments, without prejudice of actions for damages mentioned in article 20, paragraph 1.

ART. 32. Whoever shall have intentionally destroyed, pulled down, mutilated or injured a property or a classified movable object shall be punished by the penalties provided by article 257 of the Penal Code without prejudice of any damage-interests.

ART. 33. The violations mentioned in the four articles preceding shall be prosecuted at the suit of the Minister of Fine Arts. They may be established by *procès-verbaux* drawn up by the conservators or the guardians of classified properties or movable objects, duly sworn to that effect.

ART. 34. Every conservator or guardian who, in consequence of grave negligence, shall have permitted the destruction, pulling down, mutilation, injury or removal, either of a classified property or movable object, shall be punished by an imprisonment of from eight days to three months and a fine of from 16 to 300 francs or by only one of these penalties.

ART. 35. Article 463 of the Penal Code is applicable in the cases provided in the present chapter.

CHAPTER VI

VARIOUS PROVISIONS

ART. 36. The present law may be extended to Algeria and the colonies by regulations of public administration, which shall determine under what conditions and after what manner they shall be applicable.

Upon the promulgation of the regulation concerning Algeria, article 16 of the law of March 30, 1887, shall continue applicable to that territory.

ART. 37. A regulation of public administration shall determine the details of application of the present law.

This regulation shall be made after advice of the Commission of Historic Monuments.

This Commission shall be equally consulted by the Minister of Fine Arts concerning all decisions made in execution of the present law.

ART. 38. The Provisions of the present law are applicable to all properties and movable objects regularly classified before its promulgation.

ART. 39. The laws of March 30, 1887, July 19, 1909, and February 16, 1912, concerning the Conservation of Monuments and Objects of Art having an Historic and Artistic Interest, paragraphs 4 and 5 of article 17 of the law of December 9, 1905, concerning the Separation of Church and State, and generally all provisions contrary to the present law, are repealed.

No. 3. THE ENGLISH ANCIENT MONUMENTS CONSOLIDATION AND AMENDMENT ACT, 1913[89]

PART I

ACQUISITION OF ANCIENT MONUMENTS

Purchase of ancient monuments by agreement.

1.—(1) The Commissioners of Works may, with the consent of the Treasury, purchase by agreement, out of any moneys which may be provided by Parliament for that purpose, any monument which appears to them to be an ancient monument within the meaning of this Act.

(2) Any local authority within the meaning of this Act may, if they think fit, purchase by agreement any monument situate in or

[89] 3 and 4 Geo. V, ch. 32.

in the vicinity of their area, which appears to them to be an ancient monument within the meaning of this Act.

(3) For the purpose of any such purchase, the Lands Clauses Acts[90] shall be incorporated with this Act (with the exception of the provisions which relate to the purchase and taking of land otherwise than by agreement), and, in construing those Acts for the purposes of this Act, this Act shall be deemed to be the special Act, and the Commissioners of Works or local authority, as the case may be, shall be deemed to be the promoters of the undertaking.

Gift, devise, or bequest of ancient monuments to Commissioners of Works.

2.—Any person may, by deed or will, give, devise, or bequeath to the Commissioners of Works or to a local authority all such estate or interest in any ancient monument as he may be seized or possessed of, and the Commissioners or authority may accept any such gift, devise or bequest if they think it expedient to do so.

PART II

GUARDIANSHIP OF ANCIENT MONUMENTS

Power to constitute Commissioners of Works guardians of ancient monuments.

3.—(1) The owner of any monument which appears to the Commissioners of Works to be an ancient monument within the meaning of this Act may, with the consent of the Commissioners, constitute them by deed guardians of the monument.

(2) The owner of any monument which appears to a local authority to be an ancient monument within the meaning of this Act, and is situate in or in the vicinity of their area may, with the consent of the local authority, constitute them by deed guardians of the monument:

Provided that the Commissioners of Works or the local authority, as the case may be, shall not consent to become guardians of any structure which is occupied as a dwelling-house by any person other than a person employed as the caretaker thereof or his family.

*(3)–(4) Entailed property, etc.

(5) Except as provided by this Act, the owner of a monument, of which the Commissioners of Works or a local authority become guardians under this Act, shall have the same right and title to, and estate and interest in, the monument in all respects as if the Commissioners or local authority, as the case may be, had not become guardians thereof.

Effect of becoming guardians of ancient monuments.

4.—(1) Where the Commissioners of Works or a local authority become guardians of any ancient monument under this Act, they shall, until they receive notice in writing to the contrary from any owner of the monument who is not bound by the deed constituting

* Summarized.

[90] See p. 71.

them guardians of the monument, maintain the monument, and shall, with a view to the maintenance of the monument, have access by themselves, their inspectors, agents or workmen to the monument for the purpose of inspecting it, and of bringing such materials and doing such acts and things as may be required for the maintenance thereof.

(2) All expenses incurred by the Commissioners of Works in maintaining the monument shall, subject to the approval of the Treasury, be defrayed out of moneys provided by Parliament.

(3) The expression "maintenance" in this section includes the fencing, repairing, and covering in, of a monument and the doing of any other act or thing which may be required for the purpose of repairing the monument or protecting it from decay or injury, and the expression "maintain" shall be construed accordingly.

Description of owners for purposes of Part II.

5.—(1) The following persons shall be deemed to be owners of monuments for the purposes of this Part of this Act, that is to say:

(*a*) Any person entitled for an estate in fee to the possession or receipt of the rents and profits of any freehold or copyhold land;

(*b*) Any person absolutely entitled in possession to a beneficial lease of land of which not less than forty-five years are unexpired, but no lease shall be deemed to be a beneficial lease within the meaning of this section if the rent reserved thereby exceeds one third part of the full annual value of the land demised by the lease;

(*c*) Any person entitled under any existing or future settlement for the term of his own life, or the life of any other person, to the possession or receipt of the rents and profits of land of any tenure, in which the estate for the time being subject to the trusts of the settlement is an estate for lives or years renewable for ever, or an estate renewable for a term of not less than sixty years, or an estate for a term of years of which not less than sixty are unexpired, or any greater estate;

(*d*) Any body corporate, any corporation sole, any trustees for charities, and any commissioners or trustees for ecclesiastical, collegiate, or other public purposes, entitled, in the case of freehold or copyhold land, in fee, and in the case of leasehold land, to a lease for an unexpired term of not less than sixty years.

(2) Where any person who, by virtue of this section, is to be deemed the owner of a monument is a minor, or of unsound mind, the guardian or committee, or, in Scotland, the tutor or curator, as the case may be, of that person shall be the owner for the purposes of this Part of this Act, and, where such owner is a married woman, she shall have power to execute a deed constituting the Commis-

sioners of Works or a local authority guardians notwithstanding that she is restrained from anticipation.

(3) In this section the expression "entitled" means beneficially entitled; and the expression "land" means land which is the site of an ancient monument, whether the land is or is not subject to incumbrances.

PART III

PROTECTION OF ANCIENT MONUMENTS

Orders placing ancient monuments under protection of Commissioners of Works.

6.—(1) If the Ancient Monuments Board constituted under this Act report to the Commissioners of Works that any monument is in danger of destruction or removal or damage from neglect or injudicious treatment, and that the preservation of the monument is of national importance, the Commissioners may, if they think fit, and if it appears to them that the monument is an ancient monument within the meaning of this Act, make an order (in this Act referred to as a Preservation Order) placing the monument under the protection of the Commissioners:

Provided that, if in any case the Commissioners of Works consider that the making of such an order is a matter of immediate urgency, the Commissioners may make the order without receiving any such report as aforesaid.

(2) Where the Ancient Monuments Board have reason to believe that any monument is in danger as aforesaid, and that the preservation of the monument is of national importance, they may themselves, or by any person authorised in writing by them, enter at any reasonable time upon any premises for the purpose of enabling them to determine by inspection of the monument whether it is proper for them to report to the Commissioners:

Provided that, unless the Ancient Monuments Board consider that the inspection of the monument is a matter of immediate urgency, they shall give not less than seven clear days' notice to the occupier of the premises of their intention so to enter upon them.

(3) A Preservation Order shall have effect for a period of eighteen months after the date on which it is made, but on the expiration of that period shall cease to have effect unless it has been confirmed by Parliament; and, if a Preservation Order so made is not confirmed by Parliament within a period of eighteen months, no further Preservation Order shall be made with reference to the same monument until after the expiration of five years from the date on which the Order which has ceased to have effect was made.

(4) The Commissioners of Works may bring in a Bill for confirming any Preservation Order, and if, while the Bill confirming any such Order is pending in either House of Parliament, a petition

is presented against the Order, the Bill, so far as it relates to the order, may be referred to a select committee or, if the two Houses of Parliament think fit so to order, to a joint committee of those Houses, and the petitioner shall be allowed to appear and oppose as in the case of a private Bill.

(5) Where a Committee on a Bill for confirming any Preservation Order report by a majority of the members for the time being present and voting that a petitioner against the Bill has been unreasonably subjected to expense, or has been subjected to an unreasonable amount of expense in defending his rights proposed to be interfered with by the Bill, they may award cost against the Commissioners of Works and any costs under this section may be taxed and recovered in accordance with the Parliamentary Costs Act, 1865.

28 and 29 Vict. c. 27.

Effect of Preservation Order.

7.—(1) While a Preservation Order is in force, the monument to which the Order relates shall not be demolished or removed, nor shall any additions or alterations be made thereto or any work carried out in connection therewith except with the written consent of the Commissioners of Works.

(2) If, while a Preservation Order is in force, it appears to the Commissioners of Works that owing to the neglect of the owner of the monument the monument is liable to fall into decay, the Commissioners may, with the consent of the Treasury, make an order constituting themselves guardians of the monument so long as the Preservation Order is in force, and in that case the provisions of this Act shall, during that period, take effect as if the Commissioners had been constituted guardians by virtue of a deed executed by the owner.

Any order made under this subsection may be revoked at any time by the Commissioners.

Saving for buildings used as dwelling-house.

8.—This Part of this Act shall not apply to any structure which appears to the Commissioners of Works to be occupied as a dwelling-house (otherwise than by a person employed as the caretaker thereof or his family).

PART IV

GENERAL

Supplemental Provisions as to Preservation of Monuments

Power to receive voluntary contributions for maintenance of ancient monuments.

9.—The Commissioners of Works or any local authority may receive voluntary contributions toward the cost of the maintenance and preservation of any monument of which they may become the owners or guardians under the provisions of this Act, and may enter into any agreement with the owner of any such monument or with any other person as to the maintenance and preservation of the monument and the cost thereof.

Transfer of ancient monuments between local authorities and Commissioners of Works.

10.—The Commissioners of Works and any local authority may, in respect of any monument of which they are the owners or guardians (but where they are guardians only with consent of the owner of the monument), enter into and carry into effect any agreements for the transfer from the Commissioners to the local authority, or from the local authority to the Commissioners, or from the local authority to another local authority, of the monument, or of any estate or interest therein, or of the guardianship thereof.

General powers of local authorities with respect to preservation of ancient monuments.

11.—Any local authority may, if they think fit, at the request of the owner, undertake or contribute towards the cost of preserving, maintaining, and managing, any monument which appears to them to be an ancient monument and is situate in, or in the vicinity of, their area, whether they have purchased the monument or become guardians of it under this Act or not: Provided that the plans and specification of all works, other than those of immediate necessity, to be undertaken or contributed by the local authority shall be submitted to the Ancient Monuments Board, and the Board, if they object to any plans or specifications, shall report the matter to the Commissioner of Works, whose decision shall be final.

Notice to be given by owners of certain monuments.

12.—(1) The Commissioners of Works shall from time to time cause to be prepared and published a list containing—

(*a*) such monuments as are reported by the Ancient Monuments Board as being monuments the preservation of which is of national importance; and

(*b*) such other monuments as the Commissioners think ought to be included in the list;

and the Commissioners shall, when they propose to include a monument in the list, inform the owner of the monument of their intention and of the penalties which may be incurred by a person guilty of an offence under the next succeeding subsection.

(2) Where the owner of any ancient monument which is included in any such list of monuments as aforesaid proposes to demolish or remove in whole or in part, structurally alter, or make additions to, the monument, he shall forthwith give notice of his intention to the Commissioners of Works, and shall not, except in the case of urgent necessity, commence any work of demolition, removal, alteration, or addition for a period of one month after having given such notice; and any person guilty of a contravention or of non-compliance with this provision shall be liable on summary conviction to a fine not exceeding one hundred pounds, or to imprisonment for a term not exceeding three months, or to both.

(3) This section shall not apply to any structure which is occupied as a dwelling-house by any person other than a person employed as the caretaker thereof or his family.

Public Access to Monuments and Penalty for Injuring Monuments

Public access to ancient monuments.

13.—The public shall have access to any monument of which the Commissioners of Works or a local authority are the owners or guardians at such times and under such regulations as may from time to time be prescribed by the Commissioners or local authority:

Provided that—

(*a*) this section shall not apply to any monument of which the Commissioners or a local authority have been constituted the guardians before the commencement of this Act, except in cases where the consent of the owner has been given to the public having access to the monument either by the deed constituting the Commissioners or local authority the guardians or otherwise; and

(*b*) Where the deed constituting the Commissioners or local authority the guardians of the monument, in the case of a deed executed after the commencement of this Act, so provides, the public shall not have access to the monument without the consent of the owner of the monument.

Penalty for injuring ancient monuments

14.—(1) If any person injures or defaces any monument of which the Commissioners of Works or a local authority are the owners or guardians, or which is the subject of a Preservation Order, or to which this section applies by virtue of an Order in Council made thereunder, that person shall, on summary conviction, be liable either to a fine not exceeding five pounds, and, in addition to the fine, to pay such sums as the court by whom he is tried think just for the purpose of repairing any damages caused by him, or to imprisonment with or without hard labour for a term not exceeding one month.

(2) In England, any person convicted of an offence under this Act may appeal to quarter sessions in manner provided by the Summary Jurisdiction Acts.

(3) The owner of an ancient monument shall not be punishable under this section in respect of any act which he may do to the monument, except in cases where the Commissioners of Works or the local authority have been constituted guardians of the monument, and in that case he may be dealt with as if he were not the owner.

(4) His Majesty may, by Order in Council, declare that this section shall apply to any monument specified in the Order which appears to His Majesty to be an ancient monument within the meaning of the Act, and on any such Order being made this section shall apply accordingly.

Ancient Monuments Board and Inspectors

Ancient Monuments Board.

15.—(1) The Commissioners of Works shall constitute an Advisory Board under the name of the Ancient Monuments Board, consisting of members representing the bodies named in the First Schedule to this Act, and such other members as the Commissioners of Works may appoint; and may, if and when they think it desirable to do so, constitute separate advisory boards for Scotland and Wales, and, in such case, the obligation to appoint members representing the bodies named in the First Schedule of this Act shall, so far as those bodies are bodies whose activities are confined to England, Scotland, or Wales, be construed distributively.

(2) His Majesty may, by Order in Council, alter the First Schedule to this Act.

(3) The Ancient Monuments Board may, if so requested by the owner of an ancient monument, give advice, free of charge, except for out-of-pocket expenses, with reference to the treatment thereof.

Inspectors of ancient monuments.

16.—(1) The Commissioners of Works, with the consent of the Treasury, shall appoint one or more inspectors of ancient monuments, and it shall be the duty of those inspectors to report to the Commissioners of Works on the condition of ancient monuments and on the best mode of preserving them.

(2) There shall be paid, out of moneys provided by Parliament, to any inspectors so appointed, such remuneration and allowance for expenses as may be determined by the Treasury.

Advice and superintendence by Commissioners of Works.

17.—(1) The Commissioners of Works may, if they think fit, give advice with reference to the treatment of any ancient monument, and shall, as and when required, give that advice with reference to the treatment of any monument which is placed under their protection by virtue of a Preservation Order.

(2) The Commissioners of Works may also, if in their opinion it is advisable, superintend any work in connection with any ancient monument if invited to do so by the owner, and shall superintend any such work, whether required to do so by the owner or not, in connection with any monument which is placed under their protection by virtue of a Preservation Order if in their opinion it is advisable.

(3) Any such advice and superintendence shall be given free of charge, except that a charge may be made for out-of-pocket expenses in the case of monuments which are not placed under the protection of the Commissioners by virtue of a Preservation Order.

Miscellaneous

Relaxation of byelaws.

18. Where it appears to the council of a borough or a district, which expression in this Act shall include the Common Council of the

City of London, that the erection of buildings of a style of architecture in harmony with other buildings of artistic merit existing in the locality is impeded in consequence of any byelaws with respect to new streets or buildings in force in the borough or district, the council may, with the consent of the Local Government Board, relax the byelaws so far as may be necessary to allow the erection of such buildings, provided that the council is satisfied that such buildings can be erected with due regard to safety from fire and to sanitation: Provided also that no byelaws in force in the City of London shall be relaxed under this section such as are administered by the Common Council of the City of London.

Power of councils to make byelaws regulating advertisements. 7, Edw. 7, c. 27.

19. The Advertisements Regulation Act, 1907,[91] shall be construed as if the powers of local authority, as defined by that Act, included a power to make byelaws prohibiting or restricting the display of advertisements or notices of such a nature or in such a manner as to be detrimental to the amenities of any ancient monument specified in the byelaw. Any power to make byelaws given by this section shall be in addition to, and not in derogation of, the powers to make byelaws given by the Advertisements Regulation Act, 1907, or by any other Act.

Incorporation of Commissioners of Works for purposes of Act, etc.

20.—(1) For the purposes of this Act, the Commissioners of Works shall be a body corporate by that name and shall have perpetual succession and a common seal, and may acquire by gift, will or otherwise, and hold without license in mortmain, any land or estate or interest in land.

(2) Any conveyance, appointment, devise or bequest of land or any estate or interest in land under this Act to the Commissioners of Works or a local authority shall not be deemed to be a conveyance, appointment, devise or bequest to a charitable use within the meaning of the Acts relating to charitable uses.

Local authorities.

21.—(1) The council of every county and borough and the Common Council of the City of London shall be a local authority within the meaning of this Act.

*(2) Expenses of local authority under this Act, out of what public fund payable, etc.

Definition of ancient monument.

22. In this Act the expression "monument" includes any structure or erection, other than ecclesiastical building which is for the time being used for ecclesiastical purposes; and the expression "ancient monument" includes any monument specified in the schedule to the Ancient Monuments Protection Act, 1882, and any other monuments or things which, in the opinion of the Commissioners of Works, are of a like character, and any monument or part or remains of a monument, the preservation of which is a matter of public interest by

45 & 46 Vict. c. 73

* Summarized.

[91] See pp. 420, 441.

reason of the historic, architectural, traditional, artistic, or archaeological interest attaching thereto, and the site of any such monument, or of any remains thereof; and any part of the adjoining land which may be required for the purpose of fencing, covering in, or otherwise preserving the monument from injury, and also includes the means of access thereto.

*23.—(1) Reports, to whom made, etc.

(2) Application to Scotland.

*24. Repeals. Repeal

25.—(1) This Act may be cited as the Ancient Monuments Consolidation and Amendment Act, 1913. Short title and application.

(2) This Act shall not apply to Ireland.

FIRST SCHEDULE [92]

The Royal Commission on Historic Monuments in England.
The Royal Commission on Historic Monuments in Scotland.
The Royal Commission on Historic Monuments in Wales.
The Society of Antiquaries of London.
The Society of Antiquaries of Scotland.
The Royal Academy of Arts.
The Royal Institute of British Architects.
The Trustees of the British Museum.
The Board of Education.

No. 4. THE ENGLISH ADVERTISEMENTS REGULATION ACT, 1907 [93]

An Act to authorize Local Authorities to make Byelaws respecting the Exhibition of Advertisements.

1.—This Act may be cited as the Advertisements Regulation Act, 1907. Short title.

2.—Any local authority may make byelaws—

(1) For the regulation and control of hoardings and similar structures used for the purpose of advertising when they exceed twelve feet in height: Local authorities to have power to make byelaws for regulation of advertisements.

(2) For regulating, restricting, or preventing the exhibition of advertisements in such places and in such manner, or by such means, as to affect injuriously the amenities of a public park or pleasure promenade, or to disfigure the natural beauty of a landscape:

Provided that a local authority in making byelaws under this section shall provide for the exemption from the operation of such byelaws

* Summarized.
[92] Referred to in sec. 15 of the act.
[93] 7 Edward VII, ch. 27.

of any hoardings and similar structures in use for advertising purposes at the time of the making of the byelaws, and of any advertisements exhibited at that time, for such period, not being less than five years from that time, as they may think fit.

Byelaws to be confirmed by Secretary of State.

3.—(1) A byelaw made under this Act shall not have any effect until confirmed by the Secretary of State, and shall not be so confirmed until at least thirty days after the local authority have published it in such manner as the Secretary of State may by general or special order direct.

(2) The Secretary of State shall, before confirming any byelaw, consider any objections to it which may be addressed to him by persons affected or likely to be affected thereby.

(3) The Secretary of State may, before confirming any byelaw, order that a local inquiry be held with respect to the byelaw or with respect to any objections thereto. The person holding any such inquiry shall receive such remuneration as the Secretary of State may determine, and that remuneration and the expenses of the local inquiry shall be paid by the local authority making the byelaw.

(4) Byelaws made under this Act may apply either to the whole area of the local authority, or to any specified part thereof.

(5) Byelaws made by a county council shall not be of any force or effect within any borough or urban district the council of which is a local authority under this Act.

(6) The production of a copy of any byelaw certified by a person purporting to be the clerk of the local authority to be a true copy shall, until the contrary is proved, be evidence of the byelaw and of the due making thereof, and, if it is so stated in the certificate, of the byelaw having been duly confirmed.

Expenses.

*4.—Expenses incurred by local authority in carrying act into effect, out of what public fund paid, etc.

Powers of Act to be in addition to any existing powers.

5.—The powers and provisions of this Act shall be deemed to be in addition to and not in derogation of any powers and provisions of any local Act, and any powers of making byelaws under any general Act and any such powers and provisions may be exercised and enforced in the same manner as if this Act had not been passed.

*6. Application to Scotland.

*7. Definition of "local authority."

*8-10. Enforcement, application to Ireland, and penalties.

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*Summarized.

PART VII

CITY PLANNING ADMINISTRATION

CHAPTER I.

PLANNING ADMINISTRATION IN ITALY, SWEDEN AND GERMANY

Importance of Administration.—To the average citizen the only real test of a principle is whether it works or not. Logically this may not always be fair; the principle may be correct, the means of applying it, faulty. The average citizen will have none of such fine spun distinctions. To get his vote you must "show him," and the only way to accomplish it is to "do the job." Thus administration, important in all practical affairs, is especially so in matters like city planning, where political support for a new principle is necessary and success is dependent upon votes. If city planning, when introduced in any community, is badly administered and proves a failure, it will be a long time before that community, whatever methods of applying it be proposed, will give it a new trial. The previous parts of this treatise have been taken up with the substance of city planning law; this last part is concerned with the no less important matter of its administration.

Importance of Foreign Administration to Us.—In the previous parts of this work, devoted to the presentation of the substance of city planning law in the United States, foreign legislation has been freely cited, and the same free use will be made of it in this last part concerned with its administration. To us in this country the study of foreign methods of city planning in connection with our own, is perhaps especially im-

portant, both because city planning is much newer here than in Europe and administrative methods are of slow growth, and because political administration is one of the things in which we have been least successful. That we shall anywhere find procedure ready made, which we can with advantage adopt, is not probable. Administrative methods are in no small measure dependent on local conditions and the institutions of which they form a part. The study of foreign institutions may, however, bring home to us the necessity, and even suggest the substance, of amendments to our own; and—what is perhaps even more important in our country, where city planning legislation is still too recent to be judged altogether by its results—these foreign institutions may give us a basis for passing at least a provisional judgment on the aim and efficiency of our methods. City planning is a science; in its application to different localities it varies greatly, but everywhere the same principles hold true, everywhere the main aim of city planning is the same—to bring about a unity in the construction of the given community; and city planning administration is successful in proportion as it attains this aim.

City Planning Law of Recent Growth.—The knowledge and practice of city planning goes back to the most ancient times; but city planning law is a recent growth. It is not until construction by royal fiat or special act is superseded by construction in accordance with rules of general application, in which procedure and the rights of all parties affected are fixed, that planning law as now known can come into existence.

The Italian Planning Law.—Perhaps the first significant modern law attempting to deal with the various phases of city planning is to be found in Italy. This law, passed in 1865, contains the four provisions most essential in a city planning law, —those for the preparation of the plan, for its adoption by the public authorities as the rule governing future construction, for its protection against the encroachments of the owners of the land planned, and for construction in due time, including the taking of the necessary land. The plan under the Italian law, however, embraces only public streets and squares, leaving out all the other factors of city construction which are so essential

to city unity and efficiency. Later legislation, however, authorizes zoning.

Origin of Planning Legislation.—Planning legislation in Italy is an outgrowth or special application of the law of condemnation, or "expropriation" as it is called in the Roman law countries of continental Europe. In the expropriation of land a plan is required, which must be approved by an executive or legislative decree declaring the carrying out of the plan to be of public utility; and thereafter, pending the completion of the taking, the owner, although still in possession of the land and entitled to make any other use of it, is forbidden to do anything which will render that taking more expensive. The fact that the interval, in city planning expropriation, between the making of the plan and the taking is much longer than in other cases does not present the difficulties to them that it does to us. In Europe while the actual taking of property must in all cases be paid for, compensation for the infringement of property rights is left more to the conscience and good judgment of the legislature than, as with us, to the courts. Since, therefore, there is no provision in the city planning expropriation law for payment for this lessening of the former rights of the property owner, but on the contrary an express statement that no compensation is due, none can be claimed, nor can the law be challenged on that account.[1] The Italian planning law is chapters VI and VII of the General Expropriation Law of June 25, 1865,[2] and, like other chapters in that law, is dependent upon provisions in other parts of it. The statute has been amended from time to time, but in essentials it is the same as it was in 1865 when first passed.

Regulation and Extension Plans.—Under the Italian law, "building" plans are divided into "regulatory" plans—i. e., plans of the lines of future streets and squares and the change in the lines of existing streets and squares in the present built-up city—and "extension" plans, or plans of additions to that city. Communes with a population of 10,000 or over are authorized to make regulatory plans, and communes showing

[1] See p. 13.
[2] No. 2359.

the necessity of enlarging their built-up area are authorized to make extension plans. These plans the communes must follow in future construction.

Preparation and Adoption of Plan.—The responsibility for the preparation of the plan rests upon the mayor, whose duty it is to present it to the communal council for adoption. Before acting on it the council must give all parties in interest an opportunity to be heard. The plan is then transmitted to the council of state, with the opinions of various governmental and technical bodies on it and on the validity of any objections to it. The plan goes into effect when approved by royal decree, given on the advice of the council of state. The decree is a declaration that the plan is of public utility. The plan, when approved, remains in force for the period named in the decree, not to exceed twenty-five years; but this period may be extended by subsequent decree. The plan may be amended in the same way as adopted.

Effect of Plan on Private Property.—On publication of the decree the plan is binding upon the owners of private property included in it, and all subsequent construction by them within the lines of streets and squares as indicated on the plan is forbidden on pain of demolition of the structure and fine. In all other respects the lands continue to belong to their owners until the municipality begins proceedings actually to take those portions of them needed for the public works planned. No compensation is due the land owners except for the taking of the land, when it occurs. In this connection the provision, in another chapter of the expropriation law, should be noted, to the effect that:

Improvements After Notice of Plan.—

"Chapter IV, Art. 43. For structural and cultural improvements no compensation will be made [when the property is actually taken] if, in view of the time when they were undertaken, or any other circumstances, it is shown that they were made with the purpose of obtaining a larger compensation; but the owner retains the right to remove at his own expense the materials and any other property which can be taken away without injury or prejudice to the work of public utility which is to be executed."

Swedish Planning Law of 1874.—On May 8, 1874, Sweden passed a planning law which, like the Italian law, provided for the preparation, adoption, protection, and execution of a city plan, which, however, was little more than a street plan. This was superseded in some respects and in many others supplemented by a statute adopted August 31, 1907; and that statute is now incorporated as the first of the many chapters of the law of May 12, 1917.[3]

Beginnings of Modern City Planning Law in Germany.—The next country to pass legislation significant in the evolution of modern city planning law and practice was Germany. This legislation is of importance in this connection chiefly for the care with which it has been developed in administration and detail; an importance much increased by the difference in the laws of the different states and the resulting increase in precedent and experience thus furnished. These laws date from the beginning of the rapid growth of German cities after the formation of the German Empire.[4]

Changes in Law Since the War.—Since the war the national, and most of the state, constitutions in Germany have been changed. In some cases these changes are radical. For instance, the new national constitution gives the central government the power to lay down the principles to be observed by the states in their housing legislation. Prior to the enactment of these new fundamental laws the former governments had in a few cases adopted amendments to the planning law, but the new governments, as a rule, have been too busy with other matters to make new planning laws. In so far as the older legislation has been altered by either the old or the new governments, these changes have been noted in this work. There is no reason to expect that the building and planning laws, with which the Germans were reasonably content, will be changed

[3] Slightly amended May 27, 1919; see also the government circulars, No. 496, of August 1, 1919, and No. 684, of October 22, 1920.

[4] For a brief but most significant review of the tendencies, meaning and effect of city planning law and practice in Germany from the earliest times to the present day, see *Gemeinwohl und Sondernutzen im Städtebau*, by R. Baumeister, being *Städtebauliche Vorträge*, edited by Brix and Genzmer, Vol. VIII, No. IV, Ernest und Sohn, Berlin, 1918.

more rapidly or fundamentally under the new governments than they would have been under the old. In any event the existing law, useful to us less, perhaps, as a rule binding upon the German people than as a body of precedent and experience, will remain worthy our careful study.

Planning Jurisdiction of Empire Within States.—The German Empire was a federal union of states in many respects like our own union. In general, city planning was a matter of state, as distinguished from Imperial, concern, and therefore under state jurisdiction. Manufacturing, however, was in some respects an Imperial matter, and was regulated by an Imperial Industrial Law.[5] This Imperial statute regulated the building of various kinds of factories; but provided for its own execution by state officials or local functionaries under state authority, and allowed them to pass additional and more stringent and detailed laws and regulations, a permission of which they made free use; and thus building regulation and zoning are in fact almost entirely matters of state and local law and practice. Other city planning matters, over some of which it would seem that the Empire might have exercised jurisdiction if it had seen fit, have in fact been left entirely to the separate states. In this study of city planning law in Germany, therefore, it is the law of the various states, and the local ordinances under them, which will be taken up, with only an occasional reference to the constitution and laws of the nation.

State Planning Jurisdiction.—Each of the twenty-five states of the former German Empire, in planning as in other matters wholly or largely within state control, had the power to pass practically such legislation as it saw fit. In fact there are in these planning laws and in the legal systems of which they form a part many important differences, but, as a result of common history, language and environment and of the influence of the states upon one another, they are, in outline and general principle, much the same.

Local Self-Government and State Control.—Throughout Germany, in planning as in other local matters, there is a large measure of local self-government. This is especially true

[5] "*Gewerbeordnung*"; see p. 210, note 1.

in the cities, where in local affairs the municipality has jurisdiction unless deprived of it, instead of, as in this country, only when conferred. City government has its grave defects in Germany. Before the war, in many Prussian cities, under the so-called three class system now swept away, the electors were divided into three groups, each paying one-third of the municipal taxes and electing a third of the municipal council. By this system some years ago, when Essen was a city of about 350,000 inhabitants, one-third of its councilmen was elected by four voters and a second third by about five hundred. In Prussia and a number of other German states the law, now almost universally changed in this respect, generally required that one-half of the council should be householders, the non-householding class being obliged to choose householders to represent it. As a result it was often the state which, for reasons of its own, no doubt, urged municipal reform, in the interest of the more humble citizen, upon the reluctant city authorities. Nevertheless in city government Germany has probably been more successful than in any other part of the field. Here, too, the individual citizen has displayed an initiative and independence not found in the conduct of state or national affairs.

In Germany, however (and indeed in other European countries, as will be seen later) neither local self-government nor state control have quite the same meaning as in this country. In the United States the state government assigns to local authorities certain powers which, until modified or withdrawn, they employ quite independently of the central government; in Germany the state exercises a very considerable amount of supervision and control over most if not all local action.

Local Self-Government and State Control in Planning.—This interrelation of state and local authority is to be found in planning as in other matters. There are in Germany two types of planning laws. In Prussia and a few other states the state law is little more than a street and building line statute, building and housing regulations being issued by or for the different localities;[6] while in Saxony, Baden, and a number of

[6] See however the Prussian Housing Law on p. 466 of this work.

other states, city planning is a part of a state building law governing the construction, use and inspection of structures, laying down general provisions binding throughout the state except as locally varied or added to.

Under both systems, in subdivisions of the state larger than the self-governing commune, an appointive state official, with whom is usually associated a committee, part of the membership of which is elected by the representative body of the province or district, issues ordinances and administers the law for the entire district, thus doing regional planning, and regulating the territory just beyond city limits in the interest of both city and country. In the subdivisions smaller than the commune the state rules as well.

In the communes the local planning authority is the local council, and its executive,[7] elected by it. This executive is also charged with the duty of preparing matters for the consideration of the council and has certain powers independent of it.

German Planning Laws Prior to 1875.—In city planning, partly for historical reasons, there has always been in Germany less home rule than in other matters generally considered local in their nature. Prior to 1875, according to the planning laws in force in German states,[8] street lines were to be fixed in individual cases with a view to the accommodation of traffic, and building regulations, the same for entire administrative districts, issued to prevent flimsy construction. These measures, so regarded, are for the preservation of the public safety and order, which in Germany has always been treated as a state duty, to be executed by state officials. It is only with the growth of the conception of city planning as a provision for many phases of the general welfare that the necessity for a general plan was seen, a larger share in its preparation given to the local authorities, and the power of the state restricted to that of supervision. Such laws, in contradistinction to the

[7] Together, known as the *"Gemeindevorstand."* In some cities the executive is an upper chamber of paid experts and unpaid laymen, presided over by the mayor or Bürgermeister; in others the mayor and his assistants constitute the executive. The mayor is elected by the council, and his election must be ratified by the state.

[8] In some cases, however, complete city plans were in fact adopted, as for instance in Berlin in 1856.

earlier enactments, may be called modern city planning legislation. Under some of these later laws, however, the state, acting by the "building police," retains its old power of issuing local building ordinances, which now include zoning; except that the consent of the local authorities is as a rule also required. In a few large cities the state appoints special "building police," but usually confers the duty of acting in that capacity upon the executive branch of the local council, or the bürgermeister; who in so acting must obey the superior state officers and carry out their policies. Throughout the laws, as will appear when their provisions are given in more detail, there is provision for state supervision and control of subordinate state and local officials.

The Prussian Act of 1875.—The first modern planning law in Germany was passed by Prussia July 2, 1875.[9] This statute was of the street and building line type. In 1918 Prussia enacted a measure known as the Prussian Housing Law [10] for the purpose of amending the act of 1875, and laying down some principles for the enactment of local building statutes. The act of 1875 in its original form lacked many features contained in the later laws of the other states, some of which Prussia had passed as independent statutes, some of which were altogether missing. These deficiencies were to a considerable extent made good by the amendatory parts of the law of 1918. Thus the act of 1875 in its original form did not provide for zone condemnation, for which resort to the general condemnation law, requiring a royal order, was necessary. In some cases, until 1927,[11] apparently as a post war measure, the act as amended allows it, and also simplifies its procedure. The act in its original form did not authorize replotting. This was first provided for in the Prussian city of Frankfort-on-the-Main by the Lex Adickes,[12] which from time to time had been extended to other cities in Prussia. The act of 1875 as now amended permits its adoption by any city in the state. The law of 1875 in its original form does not, the amended law

[9] *Gesetz Sammlung,* 1875, N^r. 8375.
[10] *Gesetz Sammlung,* 1918, N^r. 11637 (28 March).
[11] With the consent of the minister of public works.
[12] See p. 466.

does, authorize the condemnation of remnants. The law of 1875 in its original form was, much more than the laws in force elsewhere in Germany, uniform and rigid in its requirements with regard to large and small houses, densely settled and more rural districts, and the width and construction of streets. Perhaps the most considerable service which the law of 1918 has rendered is the greater differentiation and flexibility which it has introduced in the law of 1875,[13] that law, in the main, remaining much the same as when first passed.

Content of Plan.—The law of 1875 provides for the preparation and adoption by the council of a plan of street lines and building lines for the laying out and change of streets and squares "in accordance with the public needs;" to which the law of 1918 adds the lines for small gardens, play and recreation grounds. The plan does not embrace parks, land for housing or land to be acquired in pursuance of a land policy or other municipal purpose, such as harbors, municipal enterprises, sites for municipal buildings, etc. Such land may in some cases be taken by condemnation, by virtue of a special authorization from the state to make use of the general state condemnation law, in others it must be obtained by private purchase; while the land needed to carry out the plan may be condemned without special authority, under the planning act itself. The plan may be for single streets or parts of streets or may be a "building plan" for larger areas. It does not include building or zone regulations, which are issued by the state building police —or, to be more accurate, sometimes by the state police, sometimes by the local police, acting under state authority and subject to state supervision and control; which makes them in effect a state body.

Preparation of Plan.—The plan is prepared, for the consideration of the council, by the executive branch, the preliminary work being usually done by a committee of that branch, consisting of an expert member as chairman, lay members, and sometimes members of the council and outside citizens; or if the mayor and his assistants constitute the executive[14] this

[13] See p. 466.
[14] See p. 450, note 1.

work may be done by them; a city department corresponding to our street department, attending to the routine.

Adoption of Plan.—Before the council can act on the plan it must obtain the consent of the local state police authorities, who can withhold consent only when the police interests in their charge seem to them to require it; and from an adverse decision by them the local authorities may appeal to the superior state authorities. If the plan affects a fortress, or there are within its limits public streams, state roads, state railways, etc., the local state police shall see that the authorities concerned are given a reasonable opportunity to safeguard their interests. The executive branch shall then make the plan public, or, if it affects only single pieces of land, notify the owners. If objections are raised and are not settled by negotiations between the local authorities and the objectors, they shall be decided by the superior state authorities.[15]

Obligation to Adopt Plan.—If there are no objections, or when they are finally disposed of, the council shall take final action on the plan and make it public. If in consequence of destruction by fire or other catastrophe, considerable portions of a city or village are in need of reconstruction, the commune shall, in so far as necessary, proceed to the adoption of a plan with all possible speed.

The local state police authorities may require the adoption of street and buildings lines when the interests in their charge render it necessary. There are appeals from their action.

Effect of Adoption of Plan on Land Planned.—After the plan is finally adopted and made public, the law provides that, for its protection, the police authorities may refuse permits for the erection of buildings on those portions of lots destined for public use; and the courts have decided that, before such final action in all its stages has occurred, the permit may be denied at any time after the local authorities have decided upon definite street or building lines. In practice improvements of a permanent nature, that would make the taking of the land, when it occurs, more expensive, are not permitted, but

[15] Or, in communities of less than 10,000 inhabitants, a subordinate authority (the *"Kreisausschuss"*) in their place.

the customary projections, overhangs, etc., and temporary structures, are allowed, and the owner may freely use his land for agricultural and similar purposes.

Compensation to Land Owner.—Under the general expropriation law indemnity is due both for the taking of property and for restrictions upon its use; but the city planning law usually grants no compensation for restrictions. When the plan is adopted the owner ceases to be able to employ his property in ways which will interfere with the ultimate consummation of the plan; but he is paid only for his land when it is taken. Under the plan a building line may be imposed upon an owner's land, preventing him from using it in some ways permissible before; but he can claim compensation only if, and at the time when, in consequence, buildings are torn down. In Germany such restrictions incidental to planning in the general interest and to the transformation of agricultural into building land, to the owner's profit, give rise to no claim for compensation.

To the rule that no compensation is due in city planning expropriation for restrictions upon property, but only for its appropriation at the time it occurs, there are exceptions interesting to us chiefly as exemplifications of the rule just stated. By exception compensation is made—

When the building line strikes existing buildings and the land is cleared of buildings to the new line; in which case not only the buildings but the land are at once paid for.

When the lines of a proposed street strike a vacant lot on an existing street, finished and open for travel, abutting on which buildings may therefore lawfully be erected, and buildings are thereupon erected on this building lot but in the new line, thus proving beyond doubt that the new street is ready for building; in which case that portion of the lot which the owner cannot use for building purposes, because destined for street use, must at once be paid for.

In these cases it will be seen that it is building value which is taken, and which is therefore paid for when taken. The owner may also demand the taking of the entire lot when by the building or street line it is either wholly or to such an ex-

tent appropriated that the rest of the lot under the building police rules of the locality is no longer suitable for building purposes.

Execution of Plan.—In Germany, as in Italy and other countries of continental Europe, while special authority from the state is necessary in each case for expropriation under the general law, in city planning expropriation the planning law is a general authority to take any interest in land devoted, by a duly adopted plan, to future public use. The plan remains valid indefinitely, and the commune has the right to condemn property in accordance with it at such time as it sees fit. In 1918 Prussia passed a law also allowing communes until December 31, 1926, with the permission of the Minister of Public Works, to expropriate land for "moderate and small size dwellings," which may be, and in the past usually have been, apartments in tenement houses. As already stated, the German commune has always had the right to buy land freely for almost any purpose which it considers desirable; and for some purposes may obtain from the state special authority to condemn.

Payment for Improvements.—By local statute the owner may be made liable for one half the cost of acquiring the land for that portion of a street of not more than 26 meters in width upon which he abuts; of constructing, draining, and lighting it, and of its maintenance for not more than five years; the excess in the case of wider streets being borne by the community as a whole. The owner is obliged to make payment, without interest, at the time when he builds upon his land. The street may be built by the public authorities or by a land owner as contractor, who may recover the cost, without interest, from the abutters when and to the extent that the commune would have been entitled to recover from them if it had constructed the street.

Control over Undeveloped Area.—In Prussia, except for the general obligation to care for the best interests of the public, the commune is under no obligation in any case to construct streets. The planning law of 1875 [16] authorizes the com-

[16] Sec. 12.

mune by local statute to forbid the erection of houses on streets which are not finished to the satisfaction of the building police. Streets, under this provision of the planning law, include both public and private thoroughfares, and projected thoroughfares; but, outside planned and settled areas, where there cannot be said to be any prospect of street construction, the building of houses cannot thus be forbidden. Under another statute, however,[17] in certain provinces of Prussia, the erection of dwelling houses outside settled areas is allowed only on permit, and in cities and villages this is interpreted to mean that the permit is required for houses outside the area in which buildings, with their courts and yards, are contiguous.[18] The Prussian Housing Law of 1918[19] also provides that, outside planned and settled areas, building development may be limited to detached houses not more than two stories high.

For these restrictions upon his rights the land owner receives no compensation. These statutes, together with the provisions empowering the commune to plan any suitable area at any time when there can be said to be any reason to do so, give the authorities complete control over the development of both planned and unplanned areas.

In practice new streets, although often planned far in advance of present needs, are usually constructed only as immediately needed in the narrow belt of open country just beyond the point where the solidly built city stops; and the erection of new houses is permitted on these streets only when they are contiguous to the existing houses of the old city and to each other, or it is evident that the intervals will not be wide or of long duration. The construction, on streets provided at great expense with all the improvements and utilities and entitled to all the benefits of urban administration, of buildings with more and more vacant lots between them until the city fades

[17] The so-called *Ansiedlungsgesetz* or Settlement Law, of August 10, 1904, in the *Gesetz Sammlung* or Collection of Laws of Prussia for 1904, p. 227.

[18] Baltz, *Polizeirecht,* Berlin, 1910, p. 164, and the decisions of the Prussian *Oberverwaltungsgericht* or highest administrative court, cited in note 6; especially vol. 9, p. 340; vol. 28, p. 382; vol. 48, p. 404. See also vol. 58, pp. 254 and 262.

[19] Art. 4, sec. 1, par. 1.

out into the open country, and especially the transformation of useful agricultural land into city "additions" long before they are needed, so common here, rarely occur in Germany. The Germans point out that, under a system permitting such developments, the carrying charges and expenses of operation of improvements used far short of capacity are greatly augmented and the costs of police, fire protection and city administration generally, unduly increased. As an effort to shorten the time and thus lessen perhaps the greatest waste in converting acreage into lots with needed buildings actually on them, the Prussian law and practice is well worthy of study. It has by no means, however, commended itself altogether to German city planners and social economists, some of whom think that this limitation of the supply of building land raises its price, to the profit of the land owner, instead of reducing the cost of building land and rents. The Prussian law enables the authorities to guide the development of their cities in the directions they think desirable, and sometimes to buy outlying land and direct growth toward it, to the convenience and profit of the community.

Planning Laws of Other German States.—Always preeminent among the German states, Prussia has by no means always been in the lead. In city planning legislation Prussia was the pioneer, and her statute, supplemented by decisions, rulings, and subsequent statutes, has had great influence throughout Germany; but it is generally admitted that in many details the laws of the other states contain improvements on the law of Prussia.

Saxon Planning Law of 1900-1904.—The Saxon statute is of the general building, as distinguished from the street and building line, type. It covers the entire field of building construction, including not only the choice of materials and methods of building, minima of light and air and maximum amount of lot covered, and maximum of height, but also the conversion of acreage into building lots, planning for the future city, and replanning and zone condemnation to remedy defects in existing city construction. The law also fixes the powers of state and local authorities, giving localities the right to vary

or to add to state-wide provisions, and subjecting them to the control, to a certain extent, of the state. The general features of the law and a few of its details in which it is superior to the Prussian system will be examined, and minor details and features in which it is sufficiently like the Prussian statute to make a statement of particulars unnecessary here, will be passed over. In connection with the summary of the Saxon law some of the provisions of the laws of other German states will be mentioned.

General Provisions of Saxon Law.—The general provisions of the law have two functions; first to lay down general principles, for the guidance of local authorities, so that the lay out of blocks and streets shall be adapted to the topography, that abundant sun for living rooms shall be assured, that the width of streets shall be fixed in accordance with the needs of traffic, and that in zoning the hitherto prevailing character of the locality as well as the existing needs shall be considered; and second, to make certain definite provisions, such as those for the limitation of the maximum number of stories in country places and villa sections of cities to at most three, and elsewhere four (except in the inner districts of the larger cities on especially broad streets or when heavy assessments have been levied on abutters, when five may be allowed), and those for the determination of the permissible number of stories in each case in accordance with the character of the locality and the breadth of the street. In this connection the provision with regard to rear land may be of interest and may serve also as a further illustration. It reads as follows:

Sec. 18. (*l*) In so far as building on rear land is permitted at all it is to be made dependent upon the size of the court or garden, and for dwelling purposes is, as a rule, to be allowed when, for all the windows of the rear buildings, an angle of light of at least 45 degrees is secured and the space between the front and rear buildings in appropriate cases is developed with gardens. Exceptions are permissible under special circumstances in the inner districts of larger cities. In no case shall the rear buildings of a street form a solid row.

(*m*) In the case of larger blocks and blocks suited thereto, the right may be reserved to the building police, on petition of those

interested, to lay out later streets, for dwellings abutting on which, however, only detached houses of at most three stories, may be erected.

Because the general provisions of the state law are either statements of general principles, or, when they are definite requirements, are subject to local variation, it must not be supposed that they may be disregarded by the local authorities without good reason; for the supervising power of the state may, when necessary, be used to enforce them.

Local Action.—Local variations of the general law or additions to it are permitted in so far as they are authorized by the general law or as local conditions demand. Such variations are made by local statutes. They may be passed in communes by the executive branch and the council, and require the ratification of the Minister of the Interior, by whom, on appeal, differences of opinion between the two branches are settled. The local police, in so far as the matter has not been reserved for regulation by local statute, may also issue building ordinances not only for police reasons but for the promotion of the general welfare. The state may compel the commune to pass a local statute, and compel it to execute it, if necessary. Exceptions to the provisions of the building law in individual cases of hardship are granted by the state authorities.

The City Plan.—The content of the plan is much more extensive in Saxony than in Prussia. According to the provisions of the state act, it embraces not only streets and building lines, but the "character" of buildings, whether wholly detached, semi-detached, or in groups or rows; front, side and rear setbacks; height and area restrictions; sites for public buildings; restrictions on rear buildings; zoning; and other features may be added by local statute. Plans may be proposed not only by local authorities but by land owners; and are adopted as a local statute.

Compensation to Land Owner.—In the other German states it is the rule, as it is in Prussia, that in city planning expropriation no compensation is due the land owner for restrictions incident to the transformation of acreage into building land and that therefore the owner of land planned is entitled

to compensation only for land actually taken, payable at the time of the taking. In Saxony as in Prussia the exceptions to this rule are slight, but in some of the other states they are more serious. Thus in Baden,[20] if the lot has buildings on it, the owner prevented from reconstructing them by the establishment of a building line or street line may claim compensation, and may demand that it be paid him at the time when the permit to reconstruct is refused him. If his lot, not built up, is situated on any existing street, he is entitled to payment for such part of his lot as falls within the lines of the proposed improvement as soon as the plan is adopted; and if the land affected is the interior of a square, as soon as the land for the surrounding streets is acquired for public use. Moreover payment for any lot may be claimed at once on the adoption of the plan if the whole of the lot is included in the improvement. In this connection it is interesting to note that the excellent Dutch housing and city planning law requires the authorities to show why they shall not at once take and pay for land destined by its plan to become public, whenever it constitutes more than one-third of the owner's holding.

Building Freedom.—Of late years there has been a growing feeling in Germany that the restrictions of the planning law upon the development of building land have unduly lessened its amount and raised its price, and that, especially when arbitrarily administered, it needlessly hampered private initiative. This feeling has had little effect in Saxony, or in Prussia until the passage of the Housing Law of 1918, but has modified somewhat the laws of several of the other states. The problem has been to remedy the defects of the law without sacrificing the advantages of public control.

Obligation to Extend the City Plan.—In Saxony the state may, in cases where it deems it urgently necessary, require the local authorities to adopt or change a city plan; and they are of course under the general obligation to care for the interests of the community in their charge. There is no other obligation

[20] Street Law of October 15, 1908, secs. 8, 9, 30; see also the Saxon law, sec. 40, and that of Anhalt, sec. 14. (Law of June 19, 1905 and May 21, 1906, amended October 18, 1916.)

to extend the city plan. In Württemberg, however,[21-22] these authorities are required to extend the planned area of the city whenever there is need of additional housing; and in Baden [23] it is only "when sufficient provision for the need of dwellings has been made by the establishment of local street plans and the construction of local streets" that "the erection of buildings outside the area of streets and plans may be forbidden for a given time, fixed by local police provision."

Prohibition of Building in Unplanned and Unbuilt up Areas.—Throughout Germany, not only in Prussia but in non-Prussian states, the need of protecting the unplanned areas and of controlling the development of planned areas not yet built up is appreciated. In most of these states building in unplanned areas is as a rule prevented, and the building of unbuilt-up areas is carefully regulated.[24] In Prussia, it will be remembered, a building permit may be refused for land destined by the plan for public use when, in the course of the planning proceedings, the local authorities have agreed upon the lines of improvements, and thus, tentatively at least, determined the land to be used. In Saxony [25] the authorities can establish a positive building prohibition over the entire area to be planned as soon as they decide to adopt or change a plan. This prohibition remains in force only until the plan is adopted, and in no case longer than two years. There are similar provisions in the laws of other states.[26]

Duty to Construct Planned Streets, Etc.—In a number of states there is an effort to make the duty of the authorities to construct planned streets, squares, etc., in the public interest, specific. Thus in Württemberg [27] and Baden [28] the street must be built as soon as the need for it appears, and in any event

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[21-22] Art. 7, 11.

[23] Street Law, secs. 11, 12.

[24] Saxony, sec. 15; Württemberg, art. 22, 65; Baden, *Ortsstrassenrecht*, or Street Law of Oct. 15, 1908, secs. 6, 12; Bavaria, sec. 1; Anhalt, sec. 4. In Württemberg building can be forbidden outside the planned and built up areas in specific cases, but not by general rule as in Prussia; see sec. 65 of the Building Ordinance.

[25] Sec. 35.

[26] Württemberg, sec. 12; Baden, Street Law, sec. 3.

[27] Art. 22.

[28] Street Law, sec. 10; the law of Hesse is similar.

(*a*) when, up to the land for which the street or portion of street is desired, the land owners have erected, or given security for the erection of, a continuous row of houses, on at least one side of existing streets or squares, until the built-up portion of the city is reached; or (*b*) when the owners of land abutting on a planned street agree to assume all costs of its construction until it connects with an existing street, and its maintenance for five years, the owners so constructing receiving the right of collecting from the other land owners, when they build houses on the street, the construction cost without interest as the commune would have been entitled to claim compensation if it had been the contractor.

Swedish Law of 1907 —In 1907 Sweden passed her planning law, partly superseding, partly supplementing her law of 1874. This law, now incorporated in the law of 1917, is, with some modifications, still in force as a part of the later law. In the main, the law of 1907 is similar to the Italian and German laws. The plan includes streets, public markets and other public open places and in some cases lot subdivisions. The plan is adopted by the city or town council, and must be approved by the representative of the crown. After its approval, no structures shall be erected within the lines of any public improvement made a part of the plan. Building on unplanned areas may be prohibited, and is in practice allowed only on special permit. The city has the right to carry out the provisions of the plan and may also condemn the areas needed for the purpose. The land owners are paid for the land at the time the city takes it, but receive no compensation for restrictions resulting from the adoption and approval of the plan.

The novel feature of the law is its regulation of lot subdivision. Almost invariably planning statutes recognize the importance of this subject and endeavor to lay out streets so that blocks will be produced likely to be subdivided in a manner conducive not only to private profit but to the general welfare; and make requirements with regard to minimum open spaces and percentage of uncovered area which greatly affect such subdivision. In the Swedish Law of 1907 the lot subdivision is in many cases a part of the city plan which the prop-

erty owner is compelled to comply with, and in certain cases ownership may be made to conform to this plan as a condition precedent to the improvement of the lots.[29]

[29] In June, 1920, Commissioners from Sweden made a report to the Interallied Housing and Town Planning Conference, at that time in Session in London, on planning and housing in Sweden. (*The Housing Question in Sweden,* published by P. A. Norstedt and Söner, Stockholm, 1920.) In that report the Commissioners say:

"The original documents with regard to Swedish building legislation are the *Urban Building Act* of 8 May, 1874, and the Town-Planning Act of 31 August, 1907, which last is now included as chap. 1 in the law of 1917 with regard to the formation of estates in towns. The Building Act is a law promulgated by the King-in-Council. The Town-Planning Act, on the other hand, has the character of a civil law and was brought into existence chiefly with the object of regulating in a binding way the juridical relations between municipalities and private individuals with regard to the enforcement of the town plan. According to the Building Act also there were to be town plans for towns and similar communities; but such plans frequently got no further than paper, because in carrying them into effect the community had not the support of legal rules, but was dependent on the goodwill and good faith of private land-owners. This impossible state of things was abolished by the Town-Planning Act. But the importance of the Town-Planning Act is not exclusively confined to this. In many other respects also it has formed a much needed complement to the Building Act, which is now antiquated in many points.

"Both the Building Act and the Town-Planning Act primarily apply to the *Towns* and also to the more fully developed town-like communities in country districts which in Swedish are called *köpingar* (English chipping) and are roughly equivalent to *Urban Districts.* If the Crown so directs, these laws may also be extended to other localities in country districts with a more or less dense population (such as the communities that gather round important railway stations and works, harbours and fishing centers, etc.); and these are then constituted special communities for the performance of the duties that are cited in these laws. These primitive communal combinations are called *municipalsamhällen,* which roughly correspond to *Special Sanitary Districts.* Outside the towns, the urban districts and such special sanitary districts, in which the Building Act and the Town-Planning Act are binding, there is usually complete liberty with regard to building. This limitation has had results that are anything but happy; and abuses have been further intensified by the fact that the building laws have been construed in such a way that in fact they have not been applied at all until a town plan has been sanctioned for the place in question, and even then only for the area included in the Town Plan.

"The existence of a town plan is thus an essential condition for the subjection of the individual, as regards building, to measures of public control, which are chiefly exercised by a communal organ known as *Byggnadsnämnden* or the *Building Control Board.* It is only just, however, to recognize that, within the Town Plan and in connection with the laying out of the plan, what is on the whole an effective organization of building control can take place. The possibilities of this offered by the Building Act of 1874 are in themselves extremely limited; but they have been very happily supplemented by the Town-Planning Act. As has been mentioned above, the Building Act has binding force within an area for which a town plan has been sanctioned; and the same is the case with the

local regulations which, under the name of *Building By-Laws,* have to adapt the general principles laid down in the Building Act to the special circumstances of each community. But the Building Act and the local Building By-Laws suffer from the weakness that they leave no room for any real differentiation. As a rule they do not prescribe different rules for the building of different parts of the community. This requirement, on the other hand, has been provided by the Town-Planning Act, which permits the promulgation, in connection with the Town Plan, of 'special town-planning or building regulations.'

"These regulations according to the Town-Planning Act, are passed and established in the same way as the Town Plan itself. The right of making a decision falls to the proper communal authority of the place, subject to the sanction of the Crown. These special Town-Planning Regulations have acquired extreme importance in the rational regulation of the way in which urban areas are to be built over. Thus, for instance, while the Building Act permits the erection of five-storey houses everywhere within a community where the streets are sufficiently broad, the turning to account of plots for building purposes almost to the uttermost limit, etc., these special regulations in connection with the Town Plan may lay it down that a given block, or a given part of a block, may be built over only with detached one-family houses, occupying a minor proportion of the area of the several plots, while other blocks may be covered only with industrial establishments; that certain ground belonging to a given block shall not be built upon, but shall be left as a fore-court or court for the whole block. If there are no such regulations, on the other hand, the Building Act and the Building By-Law hold good with their uniform and, from a social standpoint, very unfortunate method of building—at any rate in so far that the owner of the land cannot be compelled against his will to subject himself to any restrictions over and above those therein provided.

"These brief notes may give some idea of the extent to which the town-planning system plays a decisive part in building operations within the Swedish urban communities, and of the importance of a town-planning policy which is skilfully conducted, based on expert knowledge, and animated by a broad social spirit. And indeed the town-planning system in Sweden during the last ten years has shown a rich and fertile development, guided by a staff of eminent specialists, who have understood how to turn to account the great possibilities opened up by the law of 1907 for the utilization of the Town Plan in the service of the systematic regulation of building.

"The work of town-planning is primarily a *municipal* matter: a plan for the town *must* be made for every town and similar community and is passed by the municipal authority affected, but it must, to gain validity, be sanctioned by the Crown. Nevertheless a very substantial part of the honour of the high standard of the Swedish Town-Planning system must be awarded to the central government organ in this department, the *Royal Building Board,* which in word and deed has helped the municipalities in the solution of the very difficult problems that have come before them in the working out of suitable plans. A few figures will give an idea of the scope of this work. In the year 1918 the Building Board dealt with no fewer than 278 items in the nature of Town-Planning; and in the same year the Crown approved 45 new or considerably extended town plans, of which 31 were concerned with towns, 4 with urban districts and 10 with special sanitary districts.

"Though there is thus every reason to be satisfied, on the whole, with our present building legislation, nevertheless, as has already been observed by way of introduction, that legislation still suffers from a number of de-

Note G

No. 1. The Italian Expropriation Law of 1865[30]

CHAPTER VI

OF REGULATORY BUILDING PLANS

Art. 86. Those communes having a population of at least 10,000 may, for the public welfare, to be determined by actual need to provide for health and for the necessary communications, make a regulatory plan in which shall be shown the lines to be observed to attain the desired improvement in the reconstruction of the parts of the commune in which the faulty arrangement of the buildings is to be remedied.

Art. 87. The projects for the regulatory plans shall be made public by the mayor in accordance with the terms of articles 17 and 18 and must be adopted by the Communal Council, which shall consider any objections that may be presented.

If the Communal Council shall disallow the objections, the Provincial Deputation shall be asked for its opinion upon the merits of the project and the objections to it.

The regulatory plans shall be approved in accordance with the provisions of article 12,[31] after the Superior Council of Public Works and the Council of Sanitation, when necessary, have been heard.

In the decree approving the plan, the time within which it must be executed, not to exceed twenty-five years, shall be fixed.

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fects, the remedy of which is the object of lively interest on the part of Government authorities. Both the Building Act of 1874 and the Town-Planning Act of 1907 are at the present moment under revision.* The primary object of this revision is to tackle what we may call the *rookery problem*, that is to say the unregulated, huddled and planless building over of areas just outside the boundaries of the urban communities proper. In this respect two ways may be followed: either to extend a compulsory planning to such an extent that no building operations of any magnitude may be started at all without a detailed plan for their arrangement; or to set up and try to carry into effect certain fundamental requirements in building without going so far as to insist upon the elaboration of a complete town plan in every case. Both methods have distinct advantages and no less distinct drawbacks; and it cannot yet be foreseen which will be chosen by the legislature. One thing is certain, however, and that is that we may very soon expect a forceful intervention with the object of guiding building operations, even outside the borders of the present urban communities, into sound ways controlled by public authorities."

[30] Adopted June 25. *Raccolta ufficiale delle leggi e dei decreti*, 1865, No. 2359, p. 1477.

[31] Of this law.

* On December 15, 1920, the committee in charge of the matter brought in a report, with the draft of an amended law, for which see *Betänkande med Förslag till Stadsplanlag*, published by the Kungl. Boktrycleriet, P. A. Norstedt, & Söner, Stockholm, 1920.

ART. 88. The decree approving the plan shall be published by the Mayor and within one month brought by him, in the form of summons, to the attention of each owner of property comprised within the plan.

ART. 89. When the regulatory plan has become final, the owners of lands and of buildings comprised within it who wish to make new constructions or rebuild or modify existing constructions, whether of their own volition or through necessity, must, from the day of the publication of the plan, conform to its provisions.

ART. 90. Works made in violation of the preceding article shall be destroyed and the owner shall be fined not more than 1000 lire.

ART. 91. The area of the buildings and lands upon which construction is prohibited, as well as the public area upon which private buildings are to be erected, do not cease to belong to the respective owners until the deposit or the payment of compensation shall have been made according to articles 39 and 40.[32]

ART. 92. The approval of the regulatory plan is equivalent to a declaration of public utility and confers power to expropriate property comprised within it; provided, however, that the provisions of the present law are observed.

CHAPTER VII OF EXTENSION PLANS

ART. 93. Those communes for which the actual necessity of extending the inhabited part is proved may adopt a regulatory plan of extension, in which shall be shown the rules to be observed in the construction of new buildings so as to provide for the health of the inhabited part, and for its safest, most convenient, as well as its suitable and dignified arrangement.

To these plans the provisions of the preceding chapter are applicable.

ART. 94. If for the execution of the extension plan the commune must proceed to the construction of the public ways, the owners shall surrender the necessary land without other formality.

The compensation shall be determined in accordance with articles 39, 40, and 41;[32] but the owners shall also be liable for such contributions for the construction and maintenance of ways as may be imposed upon them by local bylaws.

No. 2. THE PRUSSIAN STREET AND BUILDING LINE LAW OF 1875, AND HOUSING LAW OF 1918

The Prussian statute of July 2, 1875 (to be found in the *Gesetz Sammlung,* or Collection of Laws of Prussia for that year, p. 561)

[32] Of this law.

popularly known as the "Street and Building Line Law," practically unchanged until 1918, was materially amended by the Housing Law of that year (passed March 28, to be found in the *Gesetz Sammlung*, p. 23). The law of 1875 is here given as amended, the portions of it stricken out by the law of 1918 being enclosed in brackets, ([ ]) and the additions made by that law being placed in *italics*.

The Housing Law of 1918 consists of amendments to the law of 1875 which appear in *italics* in the law of 1875; of matter of interest to the reader in this country which is given in full as it appears in the law of 1918; and of matter of little interest to such a reader or not relevant to this work, which is summarized. In this note the amended act of 1875 is first given, followed by all the provisions of the act of 1918, in full or in summary, or an indication where in this work they can be found.

LAW WITH REGARD TO THE LAYING OUT AND CHANGE OF STREETS AND SQUARES IN CITIES AND RURAL LOCALITIES, OF JULY 2, 1875

SEC. 1. The street and building lines for the laying out or change of streets and squares *and also gardens, play and recreation grounds* in cities and rural places, in accordance with public needs, shall be established by the Executive Branch of the Local Council in concurrence with the Local Council, with the consent of the local police authorities.

The local police authorities may require the establishment of street and building lines when the public interests in their charge *or the rise of a need of small or medium sized dwellings* render it necessary. In the latter case, the consent of the Supervisory (State) Committee[33] is required.

In the meaning of this statute, the street includes the road bed and the sidewalks.

As a rule the street lines are also the building lines. For special reasons, however, a building line *back of* [different from, but as a rule not more than 3 m. back of] the street line, may be established.

SEC. 2. Street and building lines (sec. 1) may be established for single streets or parts of streets, *squares* (*and gardens, play and recreation grounds*), or for large areas, in accordance with the probable needs of the near future, by the establishment of building plans.

If, in consequence of destruction by fire or other catastrophes, it is a question of rebuilding entire sections of a place, then the municipality shall come to a speedy decision whether and to what extent a new building plan shall be proposed; and if proposed, to provide for its immediate establishment.

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[33] *Bezirksausschuss.* Prussia is divided into provinces, the provinces into *Bezirke*, or large administrative units, and the *Bezirke* into smaller units called *Kreise*, translated as "districts."

SEC. 3. In establishing street and building lines due regard shall be paid to *the need of dwellings as well as* the requirements of traffic, safety from fire, and public health; and care shall also be taken that there shall not be any disfigurement of the streets *or of built-up localities or country landscapes.*

Streets shall therefore be sufficiently broad, and, in new sections, the connection with existing streets, good.

In order that the need of dwellings may be met, care shall also be taken that squares (also garden, play and recreation grounds) have been laid out in abundance, that opportunity has been provided to erect church and school buildings in suitable places, that for dwelling purposes blocks of a suitable depth and streets of less than the ordinary width in accordance with housing needs of various sorts have been constructed and that by the fixing of the necessary lines building land in proportion to the need of dwellings has been opened up.

SEC. 4. Every establishment of street and building lines (sec. 1) shall contain an accurate designation of the lots and parts of lots affected and shall fix the grades and indicate the method of drainage of the streets and squares in question.

SEC. 5. The local police authorities shall have power to withhold their consent (sec. 1) only when the public interests in their charge *or the rise of a need of small or medium sized dwellings* require it. *In so far as consent is refused on account of the rise of a need of small or medium sized dwellings, it requires the concurrence of the supervisory authorities.*

If the Executive Branch of the Local Council does not acquiesce in the refusal, it may appeal to the District[34] Committee.

It is authorized to act with regard to the question of need on petition of the local police authorities, when the Executive Branch refuses to accept the fixation of lines demanded by the local police authorities (sec. 1, par. 2).

In so far as such a petition is based upon the rise of the need of small or medium sized dwellings, it may be made only in concurrence with the local supervisory authorities.

For the district committee in any city which constitutes a district[35] and in any city of more than 10,000 inhabitants which forms part of a rural district,[36] is substituted the Supervisory (State) Committee; in Berlin the Minister of Public Works.

SEC. 6. If the plan to be established affects a fortress (sec. 4), or there are within its limits public streams, state roads, railways or railway stations, then local authorities shall see to it that the authorities concerned are given a reasonable opportunity to safeguard their interest.

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[34] "Kreis"; see note 33, p. 467.
[35] "Stadtkreis."
[36] "Landkreis."

SEC. 7. When the local police authorities, or, as the case may be, the District or Supervisory Committee (sec. 5) has given its consent, then the Executive Branch of the Local Council shall furnish the public an opportunity of inspection, public notice of which shall be given in the manner customary in the locality. This notice shall contain a statement that objections to the plan may be made to the Executive Branch of the Local Council within a given time, which shall be not less than four weeks. If the establishment affects only single pieces of land, then notice to the real estate owners concerned may be substituted for the opportunity for general inspection with notice.

SEC. 8. In so far as objections raised (sec. 7) are not settled in negotiation between the Local Council and the objectors, they shall be decided by the District Committee, or, in any city which constitutes a district or a city of more than 10,000 inhabitants in a rural district,[36a] by the Supervisory Committee; in Berlin by the Minister of Public Works. If there are no objections, or when they are finally disposed of (sec. 16), then the Local Council shall formally establish the plan, lay it open for public inspection and make it known in the manner usual in the locality.

SEC. 9. If several localities are concerned in the fixing of street and building lines, the Executive Branches of the Councils of the localities involved shall discuss the matter and try to come to an agreement.

On matters in which an agreement cannot be reached, the District Committee decides, or in any city which constitutes a district, or city of more than 10,000 inhabitants belonging to a rural district, the Supervisory Committee; and in Berlin, the Minister of Public Works.

SEC. 10. Street and building lines, whether established before or after the passage of this statute, can be abolished or changed only in accordance with the foregoing provisions.

For the establishment of new or the change of existing building plans in the cities of Berlin, Potsdam, Charlottenburg and their immediate surroundings, royal consent[37] is necessary.

SEC. 11. On and after the day on which the plans are made public, as provided in section 8, the owner holds his land subject to the restriction that all building beyond the building line may be forbidden. At the same time the municipality acquires the right to appropriate the land destined by the established street lines for streets and squares, *and also for gardens, play and recreation grounds.*

SEC. 12. By local statute it may be provided that on streets or parts of streets which are not yet, in accordance with the building police regulations of the locality, completed for public traffic and

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[36a] Many but not all cities of more than 10,000 inhabitants have become *Stadtkreise.*

[37] Now the consent of the State.

building on land abutting thereon, residential buildings with an exit toward these streets shall not be erected.

Within the general terms of this provision, local statute shall prescribe the conditions in detail. Such statute must be approved by the Supervisory Committee; in Berlin by the Minister of the Interior. From the decision of the Supervisory Committee there is, within a period of two weeks, an appeal to the Provincial Council.

After ratification the statute shall be made public in the manner customary in the locality.

(4) *From the prohibition exemption may be granted if a need of small or medium sized dwellings exists, if there is a well founded prospect that the owner is intending to provide for this need by the building of appropriate healthful and properly arranged dwellings and if there is no paramount proper interest of the commune to the contrary. If the council shows that proper measures have been taken sufficiently to fill the need for small or medium sized dwellings by the erection of houses of at most two stories and if security is given that these measures will be carried out, then the exemption for the erection of buildings with more stories shall not be granted.*

(5) *If by resolution of the Executive Branch and the Council it is provided that dwelling houses shall be erected only on the making of payment or the giving of security for the assessments, fixed by the Council in accordance with section 15 of this law or section 9 of the Communal Tax Law of July 14, 1893 (Gesetz Sammlung, p. 152), then the exemption shall not be granted until such payment has been made or security given.*

(6) *With regard to the granting of exemptions in contested cases the Supervisory Committee decides.*

(7) *Under the same conditions the Supervisory Committee shall have the right to decide that the commune, in so far as it maintains a public water, drainage or lighting system as a community undertaking, shall give the land owners, in accordance with general local regulations, the use of these utilities.*

SEC. 13. For the limitation of the right to build under section 12 no indemnity shall be allowed; and for the taking of land or the limitation of the right to use it by the fixing of new street or building lines, only in the following cases:

1. When, on the demand of the municipality, the land destined for streets or squares, *and also gardens, play and recreation grounds,* is surrendered to public use;

2. When the street or building line affects existing buildings and the land is cleared of buildings to the new line;

3. When the street line of a street newly to be built affects a piece of land not built on, but suitable to be built on; and this land at the time of the establishment of this line was situated on an already existing street, finished and ready for public traffic and for the erec-

tion of structures on land abutting on it; and buildings are erected on the new line.

When land is destined for streets and squares, *gardens, play and recreation grounds,* indemnity is allowed in all cases for the taking of the land ownership; and also where, under par. 2, there is a restriction of the right of ownership in the land in consequence of the establishment of a building line different from the street line, in so far as the use of that part of the land already built on is restricted. (Sec. 12 of the Law with regard to Condemnation of Land, of June 11, 1874.)

In all the above mentioned cases the owner may demand the taking of the entire lot when by the building line it is either wholly or to such an extent appropriated that the rest of the lot under the building police rules of the locality is no longer suitable for building purposes.

In this paragraph "lot" shall be deemed to mean all contiguous land belonging to the same owner.

Sec. 13*a*. *At the time when the lines for a street, a part of a street or a square are formally fixed, the right accrues to the commune to take from the owner with compensation any piece of land contiguous to the line of the street, the part of the street or the square, in so far as, according to the building police regulations of the locality, it is not suitable for building purposes.*

Sec. 14. In fixing the indemnities to be paid under section 13 *and section 13a, paragraph 1,* and in carrying out the expropriation, section 24 ff. of the Law with regard to Expropriation of Land of June 11, 1874, applies.

Disputes over the date when indemnity is due shall be decided by the courts.

The indemnities are to be paid by the municipality within whose limits the land in question lies, except where, for some special legal reason, an individual is liable.

Sec. 14*a*. *The law with regard to the replanning of building land in Frankfort-on-the-Main of July 28, 1902 (Gesetz Sammlung, p. 273) and the law of July 8, 1907 (Gesetz Sammlung, p. 259) amending section 13 of the same, may be adopted for the limits of a commune by local statute. The local statute must be ratified by the Supervisory Committee.*

Sec. 15. By local statute it may be provided that—

(*a*) upon the laying out of a new or the extension of an existing street, if it is intended that buildings shall be constructed on abutting land; or

(*b*) upon the construction of buildings on land abutting on existing streets or parts of streets where there has been no such construction—

the promoter of the addition or the abutting landowners—the

latter as soon as they build on such land—shall clear, construct, drain, provide for lighting in proper manner, and for a period not to exceed five years maintain the street; or shall contribute proportionately to the costs or pay a sum sufficient for all of such purposes.[37a] The abutting owners shall not be assessed for more than half the width of the street; or, if it is wider than 26 m. for more than 13 m.

The entire cost of street construction and maintenance shall be assessed on the abutters in proportion to their frontage on the street. *If the frontage of a lot whose owner has become liable for street costs is later increased by reason of the fact that to the lot an area has been united in use for which the street costs have not been paid, in such case the costs collectable for such increase shall thereupon be imposed upon such owner.*

Detailed regulations for assessment in accordance with these provisions[38] shall be made by local statute. The provisions of section 12 govern as to its approval, appeals therefrom, and publication.

Sec. 15*a*. (1) *By local statute it may be prescribed that the assessments provided for in the previous paragraphs and in section 9 of the Communal Tax Law of July 14, 1893 (Gesetz Sammlung, p. 152), as well as the payments specified in section 6 itself for buildings abutting on streets, which from their situation and construction appear to be specially intended for dwellings for those of small means and for building up with houses of at most two stories (small dwelling streets) may be altogether or in part remitted or made payable in installments, in so far as the buildings are intended chiefly for dwellings of the kind described or for common appliances for the benefit of those of small means (the care of children, education, recreation, and the like). If later the purpose of the building is changed, then the taxes and assessments, in so far as they were remitted or made payable in installments, may be collected from the owner of the land at the time.*

(2) *The local statute may make further provisions with regard to the conditions under which the privileges shall apply to the streets, buildings and dwellings in question.*

* Secs. 16-18. Procedural matters, of no general interest, now superseded by other statutes or repealed.

* Sec. 19. Repeal of statutes and building police ordinances, in so far as contrary to this statute.

Sec. 20. The Minister of Public Works is charged with the execution of this statute.

[37a] The paragraphs in this sentence and the symbols indicating the same, not in the original law, were for clearness introduced by the author in the translation.

[38] To which the Communal Tax Law of 1893, sec. 10, adds: "or on some other basis, especially area fit for building on."

* Summarized.

* Prussian Housing Law of March 28, 1918

ARTICLE 1

Amendments of law of July 2, 1875, for which see p. 466 of this work.

ARTICLE 2

In so far as necessary for the satisfaction of the need of medium-sized and small dwellings and the sanitation of residential districts, house blocks and the like, the Minister of Public Works is empowered, until December 31, 1926, to authorize expropriation, under the Simplified War Statute of Expropriation of September 11, 1914, and March 27, 1915.

ARTICLE 3

Extension of the right of enlarging and changing the boundaries of communes.

ARTICLE 4

Sec. 1. Building ordinances may:

1. Regulate use zoning, and, where building lines have not been established, create districts in which only detached houses of not more than two stories are allowed.

2. Create districts for which heavy industry is excluded.

3. Create districts solely for residential or industrial structures.

4. Regulate the finishing and painting of structures to be used for residential purposes, and all structures visible from public places; also require uniformity in the design of the structures abutting on streets, with due regard to the protection of monuments and the home, including the appearance, not only of the houses themselves, but of the street or country landscape of which they are a part.[39]

5. Require the submission of plans of the design of all the outer surfaces of dwelling houses.

6. Provide when garden structures, etc., shall not be deemed to be dwelling houses under the settlement laws of Aug. 10, 1904, Nov. 4, 1874, and section 12 of the law of July 2, 1875.

Sec. 2.—1. In so far as the building development requires it, the provisions of building ordinances for dwelling houses, especially those with regard to construction to ensure stability, safety from fire,

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* Summarized.

[39] The German word is *Heimatschutz* or "protection of the home." In English we are just beginning to regard the setting of the house as a part of the home, and have no one word or expression comprehensive enough to include all that the German word contains.

safety of exit, and height of rooms shall differ for large and small buildings.

2. If in larger districts[40] there are building ordinances for large and small communes, then the provisions in them with regard to height of buildings, the amount of open space to be left and the number of stories, to fit the special conditions in each commune shall be differentiated.

3. In cities which are districts as a rule building regulations shall be issued by the local authorities.

SEC. 3. Building ordinances shall provide that where detached houses are practicable and in general use, exposed party walls shall be prevented.

SEC. 4.—1. Police ordinances, so far as conditions require, shall have graduated provisions for the construction and maintenance of local streets in accordance with their special purposes (main traffic streets, minor traffic streets, residential streets and roads, etc.).

2. To promote proper residential conditions, police ordinances may limit traffic on residential streets, byways, and other local streets which serve as access to dwelling houses.

SEC. 5. Procedure.

ARTICLES 5–7

Use and inspection of dwelling houses.

ARTICLE 8

Aid by the state (20 million marks) for the erection of houses in furtherance of coöperative and other building projects.

ARTICLE 9

Repeals, etc.

No. 3. THE SAXON BUILDING LAW OF 1900[41]

* PART I. GENERAL PROVISIONS

SEC. 1. The word "buildings" as used in this law, includes not only structures of all sorts rising from the ground, but the necessary

[40] The political or administrative district consisting of several cities or other municipalities and the surrounding country is meant.

[41] Passed July 1, 1900; to be found in the *Gesetz und Verordnungsblatt* or Collection of Laws and Ordinances of Saxony for 1900, G. V. Bl., p. 381; here given as amended May 20, 1904, and to some extent by later laws; to be found in ib., p. 163. For the law in this form, with introduction, and notes, in German, see the edition of Dr. A. Rumpelt, 4th ed., Leipsig, 1911, Rossberg'sche Verlagsbuchhandlung.

* Summarized.

sewers, water and light connections, etc., for them, as well as bridges, dams, etc.

SECS. 2-4. Record of building police restrictions.

SEC. 5. Where building is destroyed without fault of owner by fire, water or other elemental force, rebuilding for five years thereafter governed by provisions relative to lots not built on.

SECS. 6-7. Exceptions to the requirements of this law are granted by the state administrative or police authorities after hearing all parties interested.

PART II. LOCAL LAWS AND POLICE REGULATIONS

SEC. 8. In so far as, in view of local conditions, a special statutory regulation of building matters, in accordance with the provisions of this statute or in addition to them, appears to be expedient, it shall be made by local statute.

Provisions of local statutes deviating from the terms of this statute are permissible in so far as they are authorized by this statute or as local conditions demand.

SEC. 9. The local statutes may be issued for communes, or manors, or parts thereof.

When lots of land abut on a street that, in its entire width, is in one commune or manor and the lots are in another commune or manor, provisions for imposing upon the owners of these lots outside its limits the duties specified in Parts IV and VI of this law may be passed as local statutes by the jurisdiction in which the street is situated when strong reasons of expediency demand. For the approval of such provisions a previous hearing of the Communal Council of the neighboring district and of the landowners affected, is necessary.

SEC. 10. The local statutes authorized by this law shall be passed, in cities under the Revised City Law, by the Executive Branch of the Local Council and the Local Council, or [in cities where the Executive Branch and Council are consolidated] by the Consolidated Council; in rural communes by the Council or [where the local government consists simply of an assembly] by the assembly; in independent manors, on petition of the owner, by the presiding officer of the district, acting with the Supervisory Committee,[42] and require the ratification of the Minister of the Interior.

Differences of opinion between the Executive Branch and the City Council with regard to the issuance or the content of such a local statute are decided by the Minister of the Interior, after hearing the District Committee.

SEC. 11. By identical resolution passed by the requisite repre-

[42] *"Bezirksausschuss."*

sentatives of the communes and so far as independent manors are concerned, by agreement thereto of the owners, such local statutes can be passed for several communes or communes and manors.

SEC. 12. Local statutes, except in so far as affected by Imperial or state statute, may be amended or repealed in the same way as passed.

SEC. 13. In cases of urgent necessity the supervisory [state] authorities, in conjunction with the District[43] or Supervisory Committees, may require the Communal Council to pass or amend local statutes in accordance with the intent of this law. The content of the local statute demanded in such cases must fulfill the requirements of this law and take local conditions into account.

If the Communal Council in question does not act in accordance with the demand so made within a period to be specified therein, the Minister of the Interior may pass an order to the desired effect, in its stead.

SEC. 14. In so far as the regulation of building police matters is not specifically reserved to control by statutes passed by local authorities, they may also be regulated by local police ordinance (sec. 12, no. 1 of the Organization Statute of April 21, 1873, sec. 102 of the Revised City Law, sec. 8, par. 3 of the City Laws for Middle Sized and Small Cities, sec. 70, par. 3, sec. 84 of the revised (state) Local Government Law).

PART III. FIXING AND EFFECT OF CITY PLAN

SEC. 15. When a tract of land, for the most part not built on, is opened up for building, a "building plan" of it, fixed by local statute, is as a rule necessary. Such a plan, however, can also be issued for lands already built on.

SEC. 16. Among the matters to be fixed by the building plan are especially:

(*a*) Building lines, within which building on lots is permitted, and by which areas for public traffic or for front gardens, and land below high water mark, as fixed by competent administrative authority or local statute (comp., sec. 84) are excluded from building.

(*b*) The "character" of buildings,[44] the setback of the building, both from the street line and the neighbor's line, the building height, the restrictions, if any, against industrial works, and the percentage of the area of rear land that may be covered with buildings.

(*c*) The fixing of water courses, drainage of the territory planned, and the carrying of certain streets over and under others.

SEC. 17. Building plans shall consist of the necessary drawings and the special building provisions to be issued.

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[43] "*Kreis.*"

[44] I. e., whether detached, semi-detached or in rows.

The more detailed provisions with regard to the form of the plans and drawings required for a building plan shall be contained in the royal ordinance to carry this into effect[45] and in local statutes and regulations.

SEC. 18. In establishing building plans regard must be paid to safety from fire, expected traffic, sanitation, suitable supply of water, drainage, the situation and development of the locality or part thereof in question, the local housing needs and the protection of streets and squares from disfigurement. In so doing especial attention is to be given to the following:

(*a*) The lay-out of blocks and street and building lines must be adapted to the topography, and so made that abundant sun for the living rooms is assured.

(*b*) The dimensions of the individual blocks shall be such as to allow of an advantageous utilization of the land.

(*c*) The width of streets and sidewalks shall be fixed in accordance with the needs of traffic at the place in question, being greater in the case of principal streets, and less in the case of side and exclusively residential streets. In streets of detached buildings without through traffic, the width of the street need not exceed 8 m. Where, later, through traffic (especially street car traffic) and therefore street widening is to be expected, front garden strips[46] of appropriate depth are to be laid out on both sides. Private streets which serve several lots as entrances to the land in the rear, shall not be of less than 6 m. in width. Streets with detached buildings and a moderate amount of through traffic, as well as all streets with attached buildings in rows, are to be laid out at least 12 m., and streets with such business or through traffic, at least 17 m. in width.

(*d*) So far as feasible, grades of streets are to be evenly distributed, sharp rises, cuts, and causeways, as well as straight street lines of excessive length, to be avoided.

(*e*) In fixing the direction of streets, care shall be taken to secure short and effective connections of streets with each other and with the main centres of traffic.

(*f*) Public open spaces and planted areas are in size, location, and number, so to be laid out as to be in accord with the needs of traffic and general welfare. Lots for church and school buildings, as well as for public play and recreation grounds, are to be provided in sufficient quantity.

(*g*) In framing the provisions with regard to the "character" of building[47] and the permissibility of factories and industrial plants, the hitherto prevailing characteristics of the place or section, as well

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[45] To be found in G. V. Bl., p. 428.
[46] I. e., setbacks, the land to be used as a garden or lawn.
[47] I. e., whether detached or attached in rows.

as the existing needs, are to be considered. In any case, however, care shall be taken that streets with attached buildings in rows, when not forbidden by local law, are intermingled sufficiently with streets of detached buildings, and that in the outer districts a suitable limitation of the density of buildings and dwellings is provided for.

(*h*) Front garden strips, when they are not solely for the later widening of the street, are to be laid out with a depth of at least 4.5 m.

(*i*) The permissible number of stories is to be determined in each case in accordance with the character of the place and the breadth of the street. For country places and the country house sections at most three, elsewhere at most four, stories shall be permitted; and only in the inner districts of the larger cities on especially broad streets or squares or when considerable assessments are made on abutters for the cost of regulating the course of streams shall, as an exception, five stories be permitted. In reckoning the number of stories, the ground story, any half story, and the roof story, when it is to be used for residential purposes, are to be included.

(*k*) The necessary courts and gardens in the interior of a block are to be assured by means of provisions with regard to their extent and location and, when necessary, by the fixing of rear building lines.

(*l*) In so far as building on rear land is permitted at all it is to be made dependent upon the size of the court or garden, and for dwelling purposes is as a rule to be allowed only when, for all the windows of the rear buildings, an angle of light of at least 45 degrees is secured and the space between the front and rear buildings, in appropriate cases, is developed with gardens. Exceptions are permissible under special circumstances in the inner districts of larger cities. In no case shall the rear buildings of a street form a continuous row of attached structures.

(*m*) In the case of larger blocks suited thereto, the right may be reserved to the building police, on petition of those interested, to lay out later streets for dwellings, abutting on which, however, only detached houses of at most three stories, may be erected.

Sec. 19. The building plans are to be filed with the building police at least in duplicate. By local law a larger number of copies may be required.

Sec. 20. If the building plan is not proposed by the municipality itself then the building police must without delay give its decision, whether it accepts or rejects the plan for further consideration in accordance with section 21 ff. A refusal is permissible when the building plan is in conflict with legal provisions, or the public welfare, or when the lands for which the plan is proposed are not owned by the proposer of the plan. If the plan is accepted by the building

police, then the building police shall obtain the decision of the municipal authority concerned as to its adoption by local law.

In case of groundless delay in coming to a decision or unwarranted refusal of the plan, the provisions of section 13 are applicable. In the same way the local municipal body having authority may be compelled to establish a building plan when necessary to secure reconstruction of buildings destroyed by fire, water, or other elemental force (* here follow provisions with regard to procedure in country districts, etc.).

SEC. 21. The building police shall, with the aid of experts, examine the building plan to ascertain that all public interests are safeguarded and the private interests of those concerned provided for as equitably as possible. The police shall therefore discuss these matters with the authorities concerned, and also, as far as they think necessary, with any other parties interested; and as a result of the examination or discussion shall cause the necessary changes in the plans to be made.

SEC. 22. The building plan shall be open to public inspection for at least four weeks. Time and place of inspection shall be publicly made known.

Objections to the building plans shall be made within four weeks of the beginning of the period for inspection or the right to object will be forfeited. Notice to this effect shall be given in the public notice already referred to.

If the building plan concerns only single tracts of land, then instead of public inspection and notice, notice to those concerned with an allowance of at least two weeks for objections, may be substituted.

SEC. 23. The building police shall pass on the objections raised within the given time.

SEC. 24. If no objections are raised or they are disposed of by withdrawal, agreement or decision, the building plan shall then be submitted to the Ministry of the Interior for ratification.

SEC. 25. Public notice of the building plan as ratified, and an opportunity for its inspection, shall be given by the municipal authorities. Upon such notice, or, when this notice is given more than once, upon the first notice, the building plan shall be deemed to be established.

SEC. 26. Building plans ratified by the Ministry of the Interior can be added to or changed only by the same method as that provided for their original establishment. Immaterial changes—for instance, small changes in elevations, or street and building lines, the breaking of street corners and the like—may be ratified by the building police alone, when, after hearing the landowners concerned, no objection is raised by them.

* Summarized.

SEC. 27. In so far as single tracts of land on streets already built up, or a new building district of small extent, or a place or section of a place without important building development, is concerned, street and building lines may also be fixed by the building police, after hearing those interested; and when thereby burdens for the municipality would be created, a hearing shall also be given to the municipal authorities. Notice of the adoption of the plan is to be given to those interested and to the representatives of the municipality, and such adoption is subject to appeal.

SEC. 28. In so far as the owners of land touched by building and street lines established by local statute or by the building police have not already begun to build in accordance with the plan, they acquire no right to compensation on account of a change in it. A change in the building and street lines already fixed shall be made only when weighty public interests are involved or there is no prospect of the further execution of the plan as it stands, and, furthermore, where buildings have been erected in accordance with the plan, such a change shall be made only after due regard has been paid to these buildings and a hearing given to the owners of the land on which they stand.

SEC. 29. The established building plan or building and street line plan controls all building in the territory planned.

Nevertheless the owner of lands destined for public traffic areas may use these lands for other than building purposes and enclose them with necessary fencing, until they are surrendered to the municipality. The owner is expressly authorized, until the municipality declares itself ready to take these lands at once, or the Ministry of the Interior has given its approval of their condemnation, to improve them for cultivation in ways which raise their value. If, later, expropriation or surrender for value ensues, the owner is entitled to compensation for this increased value.

SEC. 30. When the restrictions on building created by the adoption of the plan, go into effect, land which has not as yet been built over and which according to the plan is to be used as a street or public square, can no longer be built on except in so far as this is permitted in the case of overhanging roofs, balconies, bay windows and similar projections (comp. sec. 97) or when a public place is expressly reserved for single, especially public, buildings.

The erection of temporary buildings, however, is allowed, but as soon as the land is taken for the street or public place, the owner, without claim for compensation, must remove the buildings or allow them to be removed at his expense; and also the fencing erected after the establishment of the plan.

The same is true of the temporary use of the surface destined by the plan to become front gardens or front courts. Temporary buildings and fencings shall, on the demand of the building police, be

removed when the street on which the front garden or court abut is laid out and taken over by the municipality.

SEC. 31. When an established street or building line strikes a lot which has been built on, then upon the re-erection of a building on the lot, or the erection of additions to it, or the increase of its height, the land is to be cleared to the line established, and, so far as that land is needed for the street or public place, to be surrendered to the municipality on its demand. In so far as the municipality has made no agreement to the contrary with the owner, he is entitled to recompense for the land surrendered.

If a building line, back of the street line, is established, the owner, when in conformity to this line he removes his building, in so far as it projects, is entitled to any damage suffered by the establishment of the line.

SEC. 32. Whenever a part of a lot is taken for public use or its use for building restricted by the establishment of a new or changed line for the rectification of a water course, and the part remaining or not restricted is no longer under building police regulations, suitable for building; and thus there is prevented—(*a*) the erection of buildings on a lot which has not already been built on but which is suitable for the purpose and abuts on an existing street open for public traffic and for the erection of buildings on land abutting on it, or (*b*) the reconstruction of a building on a lot already built on—then the owner may require the municipality to take and pay for the entire lot.[48]

Local statutes may provide that and in what cases streets which mainly serve for traffic from place to place (state or district streets and so-called "communication roads") are not to be regarded as "existing streets" in this sense.

SEC. 33. When streets have been constructed on elevations, or streams have been rectified on lines, established by plan, and, in consequence, the owners of buildings erected on the street before the new levels were so fixed, or on the stream before the new course was so established, are to their damage prevented from using their property as heretofore, or, to avoid such damage, are compelled to make changes in their buildings, then they are entitled to compensation from the municipality for their loss.

SEC. 34. If in the plan the closing of a public way is provided for, the owner of a lot, whether built on or not, which abuts on this way, and thus loses its access, can demand from the municipality sufficient provision otherwise for his needs,[49] and if this is not offered

[48] The subdivisions in this sentence and the symbols indicating the same, not in the law, were for clearness introduced by the author in the translation.

[49] Replotting is such a provision; Rumpelt, *Saxon Building Law* (4th ed.), p. 151, note 2; see also sec. 54 and ff.

him he has the right to demand that the lot be taken with compensation.

In the case of lots with buildings on them, the taking may be required when a permit for a new building or a change, etc., in the old building, is refused on account of the prospective closing of the way.

Sec. 35. If the establishment or change of a building plan seems advisable, the building police may establish a building prohibition with regard to the district to be planned; with the result that new buildings or changes in buildings will not be approved or will be approved only in so far as they do not make the accomplishment of the new planning more difficult.

Public notice of the establishment of the building prohibition shall be given, with an exact description of the territory affected by it.

The building prohibition is legally in force from the time notice of it is given, and goes out of force when the final establishment of the building plan is not effected at least within two years from the first notice.

Sec. 36. During the building prohibition, as well as after the establishment of the building plan, a division of a lot situated in the area planned is allowed only with the permission of the building police. This permission may be refused when the division affects a building (*a*) if the requisite division walls along the newly created boundary are not erected or (*b*) if, because of the division, the provisions with regard to the size of courts and gardens are evaded or the execution of a building plan, or of a replotting (comp. Part V), would be prevented or made more difficult, or (*c*) if remnants unsuited for building purposes would remain.[49a]

The building police shall without delay notify the authorities in charge of land records of the going into effect of such restriction on land subdivision, with an accurate statement of the lots affected thereby and their land register numbers and owners.

Sec. 37. If tracts of land are used for enterprises for which authority for expropriation is granted, then, on demand of those entitled to expropriate, these tracts are at once excluded from the established building plan, without prejudice to their obligation to the public with relation to the construction of necessary traffic areas, drainage systems, etc. In this case, however, the land owners concerned in the building plan who by such exclusion suffer a loss or diminution of rights secured to them by the building plan, or are subjected to a greater burden, are, as a part of the expropriation, entitled to claim indemnification from those entitled to expropriate.

Sec. 38. When it appears to be expedient for the probable development of a place to fix in advance the main traffic streets and the main features of the drainage and water supply systems for a

[49a] See note 48.

larger building territory, then the building police, after hearing the local authorities, may establish a suitable extension plan for the locality, in accordance with the methods provided in secs. 21 to 26. This plan shall serve as the basis for the later individual building plans.

PART IV. PROVIDING THE LAND FOR BUILDING AND MAINTENANCE OF PUBLIC AREAS AND SEWERS

SEC. 39. Whoever builds on land abutting on a street established by building or street line plan must, to a width of 24 m. if the street is to be built up on both sides, or to a width of 15 m. if only on one side, at his own expense and in the dimensions as planned, provide the land for such street, clear it, and without compensation surrender it to the municipality free of charges, mortgages, and obligations;[50] and also, in case the municipality does not itself undertake it, as provided in sec. 43, ff., such owner must himself construct such street and sewer it; but only in so far as the lot abuts on the street; and therefore, in the case of corner lots, on both sides of it; and beyond his own lot in so far as necessary to extend the street from crossing to crossing, and in one direction from the lot to be built on, to make connection with a street already serving for public traffic.

SEC. 40. Whoever builds on land abutting on a public square must, in accordance with the provisions of sec. 39, furnish the land for and construct that part of the surface of the square destined by the plan to be street, up to 24 m. in width. He must also surrender that part of his land which is situated in the interior of the square to the municipality; and is entitled to compensation therefor.

The further construction of the interior of the square falls on the municipality (comp. sec. 72).

The construction of the square must take place at latest when the streets surrounding it are finished, the entire surface of the square is obtained, and at least a third of the frontage abutting on the square is built up.

SEC. 41. The provisions of secs. 39 and 40 are also applicable when and in so far as lots not built on are situated on streets for which, instead of the street lines formerly in force, new street lines are fixed. (Compare sec. 32.)

If, however, already existing buildings are struck by the new street lines, the provisions of sec. 31 are to be applied. The obligation to construct the driveway rests, in this case, upon the municipality.

SEC. 42. By local statute it may be provided that and to what

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[50] The obligation of the builder to surrender the necessary land for the street is not a case of expropriation, but of a condition upon the fulfilment of which permission to build is dependent. Rumpelt, *Saxon Building Law* (4th ed.), p. 158, note 1, end.

extent the permanent enclosure of a lot shall be held to be building on it within the meaning of secs. 39-41.

These provisions do not apply to enclosures which are solely in fulfilment of police obligations.

Sec. 43. The streets are to be constructed in the width prescribed by the building plan, in sections extending at least from street intersection to street intersection.

Where filling of the road bed is necessary, the material used shall be free from decayed and other stuff which would pollute the soil or the underground waters.

Already existing dirty deposits are to be removed.

In other respects the manner of constructing streets, as well as the building of sidewalks, is left to local regulation.

Sec. 44. New streets are as a rule to be sewered. The costs arising therefrom, including those for disposal of surface water, sewage, etc., fall to the persons upon whom the costs for the construction of the street fall (the owners of the buildings on land abutting on the street). The kind, depth, and capacity of the sewers are fixed by the building police, in so far as there are no local statutes in the matter.

Sec. 45. When the necessity arises, the construction of sewers, in the manner prescribed by a sewer plan to be established, which must be approved by the building police, shall be undertaken also for parts of places already built up.

On sewered streets every building serving as a residence for human beings must, as a rule, be connected with the sewer.

Sec. 46. The municipality has the right to construct streets, bridges, sewers, public wells and water systems, either as contractor at its own expense, reserving the right of recourse against abutters building later (comp. secs. 77-78), or on account of the owners of buildings on land abutting on the street. * Here follow provisions with regard to agreements, estimates, security, etc.

Sec. 47. Before the performance, however, of the duties imposed by sec. 39, ff. a building permit may as an exception be granted when:

(*a*) The owner of the building, on the demand of the building police, surrenders without charge to the municipality the portion of his land necessary for the construction of the streets and squares provided for in the building or street and building line plan, or prospectively necessary for such purposes; or so surrenders the necessary land for the widening of existing streets; and when in addition he furnishes sufficient security for the future fulfilment, according to law, of his other obligations.

(*b*) The connection of the new building with the built-up part of the place is satisfactorily made.

* Summarized.

(*c*) Provision is made, in accordance with the requirements, to be prescribed by the building police, for good and sufficient drinking and domestic water, as well as for the disposal of surface water and sewage.

As a rule use shall be made of the power to grant such a permit only in the case of structures for temporary purposes, of country houses, of structures used for public or public service enterprises, of agricultural buildings, greenhouses, storage structures, factories and other industrial plants, especially such as in operation cause noise or vibration, or use or produce evil smelling or inflammable materials.

SEC. 48. As soon as a street is constructed in accordance with the plan and the building ordinances (see sec. 43) and sewered, and also one-third of the land abutting on the street—reckoning in both sides of the street—is built up, the street shall on the petition of the owners of the buildings, be taken over by the municipality for maintenance by it.

* SEC. 49. Formalities connected with the inspection and acceptance of the street by the municipality.

SEC. 50. Until the municipality has taken over the street, its maintenance, with its accessories, is the concern of the owner of the buildings.

Any such owner is bound thereto when at least one building is erected on land abutting on the street. The refusal of the municipality to take over the street does not entitle him to close the street.

The obligation of maintenance falls upon those abutters who build later, in the proportions prescribed in sec. 77, par. 3.

SEC. 51. If the municipality itself has constructed and sewered the street at the expense of the owner of the building, its maintenance, provided the condition mentioned in sec. 48 has been fulfilled, is transferred at once to the municipality.

SEC. 52. Local statutes may provide that the contributions devolving upon the owner of the building under the foregoing provisions shall wholly or partly be taken over by the treasury of the municipality. With regard to raising the costs incurred thereby through assessments of buildings, compare sec. 78.

SEC. 53. By police ordinance the cleaning of streets and sidewalks of dirt, snow and ice, as well as the sprinkling of sand and ashes, etc., on the sidewalks in frosty weather, may be imposed upon abutters. * (Here follow provisions for procedure where a part of the street or sidewalk is in another municipality.)

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* Summarized.

PART V. REPLOTTING AND CONDEMNATION OF LAND

SEC. 54. When the proper building development of a tract of land situated within the limits of a building plan is prevented or too much hindered by the position, form or area of lots, a new subdivision of the land for the purpose of obtaining suitable building sites, may be made through change of boundaries, or replotting, even against the will of the owners, if such new subdivision is for the public interest and a petition therefor is made to the building police, either:

(*a*) by the municipal authorities, or

(*b*) by more than half the owners of the lots involved, who together own more than half of the total area involved.

SEC. 55. If the replotting is necessary for lots whose buildings have been destroyed by fire, water or other elemental force, the representatives of the municipality can be required to undertake the replotting in the way prescribed in sec. 13.

SEC. 56. Single lots, situated in the territory to be replotted, which are built on, or used in a special way (i. e., as market gardens, nurseries, etc.), whose value would make an adjustment with relation to other land much more difficult,[51] may be entirely or in part excluded from the replotting. Even in this case the owner is subject to mere corrections of boundary lines.

SEC. 57. The municipal authorities shall establish a replotting plan for the execution of the work of replotting, with the necessary provisions for carrying it out. This plan, however, may also be proposed by those petitioning for the replotting, under sec. 54 *b*.

SEC. 58. The lots of all those concerned shall be united in one mass, and the existing public ways that, according to the building plan, are unnecessary, shall be included in the mass. From the mass shall first be set aside the lands destined, by the building plan, for public traffic areas. The building land thereafter remaining shall be so divided that every landowner shall receive the same proportion in value of this remainder as he previously had in the total value of the land before it was replotted. The municipality, in place of the public ways by it thrown into the mass, shall again receive public traffic areas. In the appraisals, which shall be the basis of the replotting plan and shall be drawn up with the aid of experts, all actual and legal conditions affecting the value of the lands shall be considered.

In place of the lots, individually or in combined area suited for building purposes, are to be assigned one or more lots, so far as

[51] The present value of land used for a market garden, for instance, might be much greater than, in all probability, its later value. The land so excluded would be liable for its proportion of the cost of new streets, etc. See Rumpelt, *Saxon Building Law* (4th ed.), p. 181, note.

practicable in the same situation. Lots with buildings on them are as a rule, subject to the necessary adjustment of boundaries, to be assigned to their former owners.

Land which by the building plan is destined for streets, in so far as it is not at once used for the purpose, shall, after the construction of the necessary agricultural ways for the newly subdivided lots, be divided among the individual owners in the same proportion as the building land; and, so far as practicable, so that to each lot its future building land and its part of the future street land shall be united.

Unavoidable differences of value between the former land and that obtained by the exchange may be equalized by granting or requiring a money indemnity.

Sec. 59. Lots whose areas are too small for building purposes, in so far as a satisfactory outcome cannot be attained by agreement of those concerned, shall be surrendered, with compensation, to the municipality, which, in return for repayment of the sum paid for their surrender, shall divide them among the other owners.

Sec. 60. The building police shall in the first instance enter into negotiation with all the parties affected by the proposed replotting plan and endeavour to obtain their agreement to it. Among those interested are included also owners of lands outside the tract replotted which have a servitude on the land replotted. If an agreement is reached, the replotting plan can at once be submitted to the Ministry of the Interior for ratification. In this case no further proof of public interest is necessary.

Sec. 61. If no agreement of all concerned is reached, then the replotting plan is first to be laid before the Ministry of the Interior for its information and preliminary examination. After the adjustment of the objections thus raised, the plan is to be exhibited in the same manner as the building plan. The provisions of secs. 21 to 25, are then to be followed, as applicable.

Sec. 62. The drawing up, submission, exhibition and approval of the replotting plan may be combined with that of the necessary building plan. The execution of the replotting plan must be subsequent to the fixing of the building plan.

Sec. 63. With the establishment of the replotting plan, the newly assigned lot takes the place of the surrendered lot with respect to all rights of ownership, use, and other real rights, as well as also with respect to all public burdens, with the exception of the contributions to be paid, under the law of August 15, 1855 (G. V. Bl., p. 483 ff.), with regard to the construction and maintenance of a water course; the new lot receiving all the legal attributes of the old lot. Incumbrances, etc., remain, so far as they are not removed or changed by the replotting. The replotting may also impose new incumbrances.

Sec. 64. The acquisition of land in consequence of replotting is free from transfer taxes.

SEC. 65. When the erection of buildings in the interior of the block would prevent the advantageous replotting of the lot or make it materially more difficult, then such erection may be forbidden. This building prohibition expires when the replotting plan is not established within two years.

SEC. 66. In order to obtain less considerable changes of boundaries without recourse to the replotting procedure, the building police may make the building permit conditional upon the acquisition or surrender by the owner of the building of smaller strips of land necessary for rounding out his own or a neighbor's building lot.

This procedure is especially applicable to cases where, in consequence of the abolition of a street line, land formerly part of the street becomes part of the building land.

SEC. 67. When

(*a*) for the broadening, straightening, or continuation of streets, ways and squares, destined for the inner traffic of a municipality,

(*b*) for the laying out and the cutting through of the same,

(*c*) for the building and broadening of bridges,

(*d*) for shore and dam structures,

(*e*) for the construction of sewers and water works, for the connections of the same with the individual lots and the connection of sewers with those of neighboring communities,

(*f*) for the enlargement or merger of building areas not suitable for building purposes, in the solidly built up part of the locality,

land must be acquired or a servitude on land imposed—then on petition of the representative of the municipality, to be made through the building police, with the approval of the Ministry of the Interior, against the wishes of the landowners concerned, if necessary, the required land may be condemned, with compensation, or the servitude imposed, in so far as this appears to be for the public interest.

SEC. 68. When the tearing down of buildings or groups of buildings, in the interest of traffic or the public health, is indispensable, or the building plan for a tract of land whose buildings were destroyed by fire, water, or other elemental force cannot otherwise be carried out in such a manner as to avoid similar dangers in the future, then the Ministry of the Interior, on petition of the municipal authorities, is authorized to grant permission to condemn the entire tract necessary to a suitable execution of the undertaking.

SEC. 69. To the petition for the permit to expropriate there is to be annexed the building plan, or, if the proceeding does not involve such a plan, a special expropriation plan.

SEC. 70. Before handing in the petition to the Ministry of the Interior, the building police shall endeavour to obtain an amicable agreement.

SEC. 71. After the issuance of the permit for condemnation, the land owners concerned, within a time to be fixed by the Ministry

of the Interior, have the right, in the cases covered by sec. 68, themselves to construct on their lots the new buildings provided for by the building or condemnation plan. After the expiration of the time so fixed, the expropriation of these lots or areas on which the development as planned has not been carried out, follows.

SEC. 72. The municipality may by local laws be given the right to demand the immediate condemnation of the area for a public square, as laid out by the building plan established by local law.

SEC. 73. The condemnation, as well as the fixing of the compensation therefor, shall be done by the building police; or, when a municipality is concerned whose local authorities are also building police, by a representative of the Ministry of the Interior.

The condemnation must be preceded by a conference on the spot with those interested, to which the necessary experts for the fixing of the compensation shall be summoned.

SEC. 74. The building police shall request the land record authorities to make the entries in the land records which are necessary by reason of the establishment of the replotting plan or of condemnation.

SEC. 75. When the lots to be surrendered by reason of a replotting or condemnation plan are built up with dwelling houses or are to be regarded as built-up lots (comp. sec. 5), then the municipality on demand, so far as practicable, shall give the owners the opportunity to acquire another building lot in the neighborhood at a suitable price.

The municipality shall take the same care that the occupants, who must leave a house in consequence of a replotting or condemnation, shall find suitable accommodations.

PART VI. INDEMNITIES, RIGHTS OF RECOURSE AND BUILDING ASSESSMENTS

* SECS. 76-78. Whoever has duly laid out and paid for a street, with bridges, sewers, etc., is entitled to recover the expenses from abutters on the street subsequently building on it, in proportion to their frontage. He also may recover if an existing building by reason of the street improvement obtains window openings, permissible by reason of the new street, sewers, an exit to the street, etc. If a new building may be built more advantageously, cheaply, or of greater area or height, he may recover in proportion to the increase in value of the builders' land. These payments are enforced by refusal of building permit, unless paid or secured. Local statute may authorize the municipality to recover for all street construction and improvements, and also for building, replotting and condemnation plans, as well as for payments made under the build-

* Summarized.

ing law, not otherwise repaid. These recoveries may be had, in full or in part, as payments for the right to build, from those materially benefited. The amount may be determined according to frontage or according to the method of building, especially the area built over, the number of stories, and the number of families provided for.

PART VII. BUILDING ON THE LOT

A. General Requirements

* SECS. 79-89. The lot must furnish a firm foundation, free from rubbish, etc.; have water facilities; be on a street established by public plan, or on an existing way, or have access secured to the builder. (Exceptions may be allowed by the building police); be above high water mark and not encumber the bank of a stream, etc.; not interfere with railroads; not be a nuisance to neighboring land by reason of smoke, etc. Local statute may prescribe that and in how far single parts of localities shall be specially devoted to industrial works, and that in other parts such works shall not be allowed at all or only under special restrictions (sec. 23, par. 3 of the National Industrial Ordinance);[52] shall not be too near state forests; protection of neighbor in building; use of neighbors' land for scaffolding, etc.

B. Erection of Buildings

SEC. 90. The construction and the internal arrangements of the building must not endanger the safety and health of the occupants. Dwelling and work rooms must be sufficiently dry and accessible, of sufficient size, and have a sufficient supply of light and air.

By local statute special higher architectural requirements for buildings to be erected may be made for particular streets or parts of streets.

SEC. 91. The provisions contained in secs. 94 to 138 shall govern except in so far as superseded by local statute.

SEC. 92. In the case of buildings in independent manorial precincts outside of inhabited places, in the smaller places in which for the most part agriculture is pursued, and in places with for the most part a poorer population, the building police may, even where not otherwise expressly allowed by this law, grant exceptions to the provisions of secs. 94 to 138, provided the necessary regard is paid to safety and health. * (Here follow provisions with relation to the drawing up by the local authorities of a list of such places, the giving of notice of the beginning of changed conditions, and the revisions of lists by the higher authorities.)

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* Summarized.

[52] See p. 210, note 1.

Sec. 93. The building police may also grant exceptions to secs. 94 to 138 for single buildings at a distance from built up localities when there is no prospect of a further building development of the land round about within a reasonable time.

The building police may also impose additional requirements appropriate to the peculiar character of and dangers incident to the use of church, school, factory, large warehouse, and business structures, theatres, concert, dance, and assembly rooms, the larger hotels, and similar buildings in which large numbers of people assemble, as well as for steam boilers, machine shops, elevators, etc. Through ordinances to carry these provisions into effect or local police ordinances, general provisions may be issued with regard to these matters.

Sec. 94. Local statutes shall provide whether buildings shall be detached or in attached rows. In rural districts, and country house suburbs, for which there is no local statute, only houses with an open space on each side, or double or group houses are, as a rule, permissible. Nevertheless exceptions may be allowed, especially for factories, agricultural court yards and the workmen's houses built for the same, and state and public service enterprises.

Sec. 95. In the case of detached buildings the open space between two front buildings shall be at least equal to the height of the principal cornice of the higher building, the open space between the building and the boundary line, at least equal to half of the height of its own highest cornice, and as a rule not less than 4 m.

In the case of corner lots and lots contiguous to them, as well as in case of common courts (compare sec. 101), exceptions are permissible.

Where the height of the principal cornice is less than the highest point of vertical projection of the building, the height of the building shall be measured from this highest point. But such projections, when and in so far as they do not exceed one-third of the depth of the building, shall not be taken into account.

Sec. 96. In attached row building, the buildings are as a rule to be constructed without any space between them. Exceptions are permissible where the space is at least 10 m. in width, if care is taken that the street is not disfigured by rough party walls.

Sec. 97. Projections such as pillars, porches, and similar structures, not more than 25 cm. over the street line, are permissible in streets at least 12 m. broad; but the combined width of these projections must not exceed half the width of the entire building. The projection of bay windows, balconies, etc., over the street line should not exceed 1.50 m. and shall not be less than 3 m. above the walk. Projections at ground floor height are permissible, subject to revocation, up to a third of the width of the front of the building in the case of attached buildings in rows, and up to a half in the case of detached buildings. But on the suppression of the front garden they

are to be reduced, without right of compensation, to the permissible projection on streets.

Windows and other light openings which give in a straight line on a neighboring lot, either built up or serving as court or house garden, as well as bay windows, balconies, or similar structures, on the side toward a neighboring lot, must be at least 4 m. distant from the boundary.

Sec. 98. Buildings situated on streets must not be more than 22 m. high (compare sec. 95); nor, as a rule, shall the height of the building exceed the width of the street, including any front gardens. In case, however, of particular parts of buildings set back from the building line, a greater building height may be permitted. Vertical roof projections (gables, towers, dormers, and the like) shall not materially exceed, in their total width, half the length of the building front of which they are a part. Structures in the interior of a city may be rebuilt to their former height when also material improvements, particularly in respect to courts, are made at the same time, either on the lot itself or in the neighborhood.

In the case of streets with buildings only on one side, greater heights than in accordance with the street width are permissible. Buildings between two streets of different width (e. g., corner houses) must, as to the front on each street, conform in height to the width of that street; but as a rule the greater building height can be carried around the corner along the narrower street not more than 16 m. in length.

Sec. 99. The number of stories (in which number the ground floor, any mezzanine or other intermediate stories, as well as roof stories with living rooms in them are included) shall, in rural places and rural sections as well as in places where previously in general there have not been higher buildings, have not more than three stories; otherwise not more than four. But in the interior of a city of more than 50,000 inhabitants, as well as on especially wide streets, on open squares, rectified water courses and similar open spaces, which have imposed material expenditure on the abutting landowners, five stories may be permitted.

Sec. 100. In front of or behind buildings there must remain, as the property of the owner of the buildings and of his legal successors, vacant land (courts, gardens) of such extent as to furnish the surrounding buildings with the necessary access for light and air, and with necessary space and access for fire and life-saving apparatus. For these purposes there shall be left, immediately in front of or behind every dwelling house, a free court space or garden sufficient for these demands, the depth of which shall at least equal the height of the building (sec. 95). The erection of small single story buildings for use as laundries, wood sheds and for minor domestic purposes, sheds, garden houses, and the like, which, together, shall not occupy

more than a quarter of the space to be left free, shall not be considered as building over the same. In the case of corner houses, factories and agricultural courtyards, as well as of the building or rebuilding of houses in parts of localities already built up, the building police may allow such exceptions as the circumstances demand.

SEC. 101. When the owners of two or more neighboring lots within the same block, enter into mutual agreements in conformity with the provisions of sec. 2, ff. to keep open given parts of their land (common court), then these parts may be reckoned together, and thereby the requirements of sec. 100 fulfilled without regard to ownership.

SEC. 102. On condition that the requirements of sec. 100 are fulfilled attached dwelling houses may be erected in rows to a depth of 16 m. and detached buildings to a depth of 20 m.

SEC. 103. The building police may permit not more than half the area of a court prescribed in sec. 100 to be roofed over to a height not to exceed 6 m. if the light of the windows of the first story is not thereby impaired.

Light courts must have an area of at least 10 square m. with 2 m. least horizontal dimension, and a glass roof that in all weathers allows sufficient access of light and air and that is provided with sufficient ventilating arrangements. If two neighboring light courts are situated next to one another, without a high division wall on the boundary line, the surface of the two light courts may be reckoned together in passing on their permissibility if the owners contract in accordance with sec. 2 ff. to retain them. Neighboring windows, opposite one another on such a common court, must however, be distant from each other horizontally at least 3.5 m.

On light courts, as a rule, rooms other than stair walls, entrances, connecting corridors, closets, small bathrooms and toilets, are not permitted.

The bottom of the light court must at all times be accessible, water tight and connected with the sewer.

Light shafts (shaftlike, mostly glassed over cuts in the body of the building that are used to introduce light into single rooms directly under one another, through the roof, and, as necessary, through one or more stories, without at the same time serving for necessary ventilation) shall as a rule not extend to the surface of the ground floor.

SEC. 104. Side and rear buildings shall be erected only in conformity with the provisions in sec. 100 and not higher than the front buildings to which they belong. They must extend only to one side boundary and, so far as they are not on the boundary, shall be back from it at least 4 m.

Rear buildings of less than 4.5 m. in height to the cornice, may be erected immediately on the rear lot boundary, unless this touches a public street.

* Secs. 105-113. Structural provisions.[52a]

* Sec. 114. Required stairs.

Sec. 115. Dwelling and work rooms, and generally all rooms which serve for a considerable period for the occupation of human beings, shall have a clear height of at least 2.85 m.; or, under rural conditions, of at least 2.25 m.

The height of vaulted rooms shall be measured to the highest point of the intrados. By local statute minimum requirements of space and other conditions for dwelling and especially for lodging rooms may be fixed.

Sec. 116. Royal ordinance or local statute shall regulate the construction of dwelling rooms in the roof. Cellar dwellings are permissible only in those places in which they already exist, and only in so far as they fulfil the conditions and health requirements set up by local statute.

Sec. 117. The rooms planned for the continued stay of human beings must be provided with sufficiently large, suitably situated windows, made to open. The windows must open immediately into the open air, except in so far as single rooms, in accordance with sec. 103, par. 3, may be situated on a light court. Local statute may fix the size of the windows.

* Sec. 118. Prescribed wash room, with kettle and heating arrangements, in cellar of houses constructed to rent to more than three families.

* Secs. 119-132. Structural provisions.[52b]

Sec. 133. For every independent dwelling, for every workshop, and so far as practicable, for every store, a separate toilet shall be constructed, which, when feasible, shall be located on the north side of the house, but not toward the street. As a rule it shall be on the same floor as the dwelling, shop, etc. It shall be sufficiently lighted and ventilated, and not less than 0.80 x 1 m. in width and breadth.

Every toilet room shall be provided with one window, opening immediately upon the outer air and easy to open. * (Here follow provisions as to plumbing, etc.)

* Secs. 134-138. Structural provisions.[52c]

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* Summarized.

[52a] These provisions cover, among other matters, strength of construction, materials for roofs, projections and stairs, protection against dampness and fire, adaptation of walls to the purposes of the building, foundations and cellars, party-walls, etc.

[52b] Refer particularly to construction of chimneys, their material, height, dimensions, and relation to the walls of the building; the construction of stoves as well as of the chimneys and flues is specified in great detail.

[52c] Deal with privies, drains, cesspools, plumbing, stables and disposal of ashes. Local laws may forbid the inclusion of stables in residences; otherwise their construction is carefully regulated. All the other provisions are mandatory.

* PART VIII. PROVISIONS TO INSURE SAFETY DURING CONSTRUCTION

* PART IX. POLICE INSPECTION OF BUILDINGS

* PART X. FEES

* PART XI. TEMPORARY PROVISIONS AND REPEALS

No. 4. PLANNING PROVISIONS OF THE DUTCH HOUSING LAW[53]

SECTION 5. EXPROPRIATION

ART. 26.—1. The Expropriation Law of August 28, 1851, as last amended April 15, 1886, is hereby amended by adding thereto a Title IV. to be called "Expropriation in the Interest of the Housing of the People"—and to read as follows:

ART. 77. Without a previous statutory declaration of public utility, expropriation may occur in the interest of the housing of the people for the following purposes:

(1) To clear lots for which, because of insufficient access of light and air or the lack of other necessities for dwelling purposes, an adequate improvement on account of the location of the building or its connection with other buildings can in other ways with difficulty if at all be attained.

(2) To remove one or more dwellings whose adequate improvement as to their situation or connection with one another or with other dwellings or other buildings can with difficulty if at all be attained.

(3) To remove one or more dwellings which, whether suited or intended for residence or not, prevent dwellings next or near them from being put into condition suitable for residential purposes.

(4) To obtain control over lots, whether built upon or not, in order that an established building plan in the interest of the housing of the people or an extension plan proposed under sec. 6 of the housing law may be carried out.

In the above named cases expropriation shall be in accordance with the provisions of the following articles:

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* Summarized.

[53] Enacted June 22, 1901; amended in particulars not important in this connection in 1902, 1903, 1905, 1906, 1907, 1913, 1915, 1917, 1919; for the law and the amendments to it, in Dutch, see the session laws of the years named. A translation into German of the entire law will be found in the *Proceedings of the Sixth International Housing Congress,* Düsseldorf, 1902, p. 425. A good account of the law and housing and planning in Holland generally, with a German translation of the entire law, is given by Rudolph Eberstadt in his *Neue Studien* (Gustav Fischer, 1914), Vol. 2, p. 359.

ART. 78. Both the municipality and societies, joint stock corporations and foundations whose activities are confined exclusively to the improvement of housing and who are authorized thereto by the Crown, after hearing the Provincial Committee, may avail themselves of the right of expropriation.

The conditions for granting such permission shall be fixed by the state.

ART. 79. Except as provided in art. 87, expropriation in the interest of the housing of the people occurs on resolution of the City Council, with Royal ratification, after hearing the upper or executive branch of the City Council. *(Here follow procedural provisions.)

ART. 87. When the city council refuses the request for expropriation by a society or foundation, the petitioner may apply to the Crown. *(Here follow procedural provisions.)

ART. 93. When the building to be expropriated is declared unfit for habitation, an estimate shall be made of the value of the land and of the building materials, if the building cannot be used for any other purpose. When the building can be used for other than residential purposes, the amount paid shall be the value of the land and of the building materials plus the amount that seems just in consideration of the additional advantages which the owner could have obtained from such a use. In this connection art. 92 applies.

When only a part of the building to be expropriated is declared unfit for habitation, this fact shall be taken into consideration in arriving at the value. The fact that the part declared unfit for habitation is or is not still fit for other uses, shall also be considered.

ART. 94. When a demand under art. 14 of the Housing Law has been made for improvements without result, then the value to be paid shall be that of the building as it would have been if improved less the cost of making the improvements.

When the building is occupied by a greater number of persons than is lawful under local ordinances, the increase of rents by reason of such excess shall not be taken into account.

SECTION 6. EXTENSION PLANS

ART. 27.—1. The City Council is authorized in the interest of systematic building development to forbid buildings to be erected or reërected in a place that by previous resolution of the City Council is destined in the near future to be a street, canal or square.

2. In a resolution containing a prohibition against building it shall be stated what parts of the land belonging to one owner the prohibition includes; and if the prohibition covers more than ⅓ of his land included in the plan, the reasons are to be given why purchase or expropriation does not occur at once.

* Summarized.

* 3.—6. Appeal, notice, opportunity for inspection, confirmation, etc.

ART. 28. In municipalities containing more than ten thousand inhabitants and those whose population has increased more than 1/5 in the last five years, the City Council, subject to ratification by the Provincial Committee, shall establish an extension plan, in which the land shall be indicated that is destined in the near future for streets, canals or squares.

2. The plan shall be revised at least once in every ten years.

3. The extension plan and the plans for its revision shall be submitted to the Provincial Committee. From a refusal to ratify it the City Council, and from its ratification private parties interested, may appeal to the Crown within a month.

* 4.—6. Notice, opportunity for inspection, etc.

* 7. Issuance of regulations to carry these provisions into effect.

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* Summarized.

CHAPTER II.

PLANNING ADMINISTRATION IN ENGLAND, CANADA AND FRANCE

Planning in England Prior to 1909.—Before 1909 there was little planning law in England. No provisions existed for the preparation of community plans, or, if made, for their adoption as a rule of action for the authorities; nor for the protection of projects for the future construction of streets and other public features from the encroachment of the land owners affected. Under the housing acts, however, slum areas could be condemned and reconstructed, and by special acts streets were sometimes widened and additional land taken by excess condemnation.

Public control over private developments was slight. The Public Health Acts [1] empowered the local authorities outside of London to pass byelaws of more importance in housing than in planning. These byelaws were subject to confirmation by the Local Government Board—a national authority [2]—but once duly confirmed could not be modified or abrogated by it. Under such byelaws the local authorities could regulate the amount of open space around houses, limit their height, establish building lines in certain cases and determine the width of streets. It was not until 1907 that, subject to many limitations, the direction of these streets could be fixed in this way; nor could the owner (except under the special provisions of one or two city charters) be required to submit a plan of the proposed development of his tract as a whole. In London

[1] Originally passed in 1848, ch. 63. The reference is to the act of 1875, ch. 55, sec. 157 (see also sec. 155) as amended by the Health Amendment Acts of 1890, ch. 59, and 1907, ch. 53; see also Public Health (Buildings in Streets) Act, 1888.

[2] These duties are now performed by the Ministry of Health; see 9 and 10 Geo. V., ch. 21.

and a number of other cities planning was governed by special acts which were not materially in advance of those in force elsewhere.

English Planning Act of 1909-1919.—In 1909 England passed her first systematic planning act. In 1919 it was amended in many particulars, and is here summarized in its amended form. Perhaps the most important change in the law of 1909 made in 1919 is that, while formerly the preparation and adoption under it of plans by local authorities was permissive, it is now mandatory on all urban authorities who on January 1, 1923, have a population of 20,000 or over.[3]

Purpose of Act.—The English act is so different from all the others that before taking it up in detail it may be well briefly to consider its general purpose. In other planning acts the unit is the entire city. It is quite true that under these systems parts of cities are regulated by plans made at different times, and that all planning should be varied in different localities to suit local conditions; it is quite true that, in Italy and Germany, where cities are more solidly built than in Great Britain or on this side of the Atlantic, the plans are generally "extension" plans, for the development of districts not yet built up and the laws are framed with that fact in view; but invariably, except in England, there is, in existence or in prospect, a plan of the city as a whole, of which the sectional plans form a part, and a planning law applicable to it all, under which it can all be regulated. In England the planning unit is a selected section of the city, and there is no general plan with any legal force or planning law applicable to the entire city. It is the special area only which is planned, under a scheme especially devised for it, in effect an act of Parliament, which overrides "any statutory enactments, byelaws, regulations or other provisions under whatever authority made, which are in operation" [4] in the city as a whole. Within that area contemplated improvements are protected; outside it there is not and cannot be any such protection. Within that area land owners and

[3] The French mandatory city planning law was passed a few months before the English mandatory provisions, referred to above, were enacted.

[4] Act of 1909, Part II, 55- (2).

the community are entitled to receive the benefits and forced to bear the burdens the scheme creates; outside it they do not receive these benefits and are free from these burdens. For instance, in various areas in the undeveloped parts of the territory within the limits of the city of Birmingham, zoning rules are in force; in the other portions of the suburbs there is not as yet, and in the built up part of the city there cannot be, any zone protection; and any coördinated, general zoning system for the city as a whole is impossible. It does not follow that the English law is better or worse than the others—there are advantages as well as disadvantages in regulations specially devised for a given district.

Area To Be Planned.—The area to be planned is "any land which is in course of development or appears likely to be used for building purposes" [5] even if the time when it will probably be so used is remote. "The expression 'land likely to be used for building purposes' shall include any land likely to be used as, or for the purpose of providing, open spaces, roads, streets, parks, pleasure or recreation grounds, or for the purpose of executing any work upon or under the land incidental to a town planning scheme, whether in the nature of building work or not." [6] Land already built on, or not likely to be used for building purposes, may also be included if so situated that the general object of the scheme would be better secured thereby; and to that end structures, as far as expedient, may be destroyed or altered.[7] A built up tract which would not aid in this way is often left as an island in the chosen area. The purpose of the act is therefore the improvement of undeveloped building land, the inclusion of other lands in a scheme being merely incidental to that purpose. Improvements in the older parts of cities must still be made under the common law, by slum clearances under the housing acts or by special acts with excess condemnation, as was done before the passage of the planning act.

There may be more than one area selected for planning

[5] Sec. 54-(1).
[6] Sec. 54-(7).
[7] Sec. 54 as amended in 1919.

within the limits of the same local authority, each with its separate scheme; or an area may be within the territory of more than one such authority.

Planning Authorities.—The authorities concerned in the planning of a given area are: (1) The local government, urban or rural, within the limits of which the area or any part of it is situated. This government is called the "local authority." To it is given the power (*a*) to prepare and adopt a scheme, or accept with or without modifications a scheme prepared by land owners; (*b*) to confer with other local authorities with regard to the preparation and adoption of a scheme and appoint joint committees for the purpose.

Every urban district containing on the first day of January, 1923, a population of more than 20,000 shall prepare and submit to the Local Government Board a scheme for the planning of all land within its limits with respect to which such a scheme may be made under the planning law.

(2) The authority to execute and administer the scheme. This authority is named in the scheme and is known as the "responsible authority." Where the area is within the limits of more than one local authority or of a local authority other than the one who prepared it, the responsible authority may be one of these authorities, or one of them for certain purposes and another for others, or a joint body constituted for the purpose. Invariably, however, until recently the local authority has been the sole responsible authority for areas or parts of areas within its limits.

(3) The Ministry of Health,[8] to whom is given the power (*a*) to approve schemes with or without modifications, without which approval no scheme becomes effective; (*b*) to prepare regulations, which become a part of every scheme except in so far as otherwise provided in a scheme approved by the minister; (*c*) to act as arbitrator or judge in many cases with regard to the rights and duties of the parties under the scheme; there being in some cases appeals to the courts, and in a few instances to Parliament; (*d*) to require a local authority to prepare and

[8] This power, formerly exercised by the Local Government Board, is conferred upon the Ministry of Health by 9 and 10 Geo. V, ch. 21.

execute a planning scheme if, after a public local hearing, the minister is satisfied that this is necessary.

Content of Scheme.—The special scheme, which is devised for each area planned, gives in detail the objects in view and the methods to be used in attaining them. The general object to be sought is stated in the act [9] to be "securing proper sanitary conditions, amenity, and convenience in connection with the laying out and use of the land, and of any neighboring lands." The comprehensive but somewhat indefinite expression "general welfare," so much employed in this country, is not used; but "sanitary conditions" is in these days a broad phrase, and "amenity" or the quality of being agreeable, which includes æsthetics, and "convenience," which embraces many minor matters in the aggregate of great importance, add much to the scope of the definition.

To carry out the general object of the act, so broadly stated, the Ministry of Health is granted the power to frame a set of general provisions, or separate sets of general provisions adapted for areas of any special character; and in a schedule [10] certain specific matters with which these provisions may deal are stated. They include not only public features of the community such as streets, public open spaces, sewers, water and lighting systems, etc., and private features such as private open spaces, building and zoning regulations, etc., but preservation of places of historic interest and natural beauty, prohibition of billboards, variation of statutes and byelaws, agreements with and between land owners, trusts for public purposes, and methods of planning administration. The National Government has not as yet drawn up any general provisions,[11] and in all probability will not do so until much more experience under the act has accumulated. Pending such provisions the Ministry of Health is authorized to accept as part of each scheme such special provisions as to it seem proper or to modify those proposed in the scheme. In addition to these provisions

[9] Sec. 54-(1).

[10] The fourth under the act of 1909.

[11] Procedural regulations, however, were issued under the act of 1909 on February 11, 1914 (since amended); and under the act of 1919, on March 30, 1921.

there may be inserted in the scheme regulations for "supplementing, excluding, or varying the general provisions, and also for dealing with any special circumstances or contingencies for which adequate provision is not made by the general provisions," and for varying statutes, byelaws, etc., in that special area.[12] Evidently the statute furnishes little more than a frame work, and the actual planning rules are to be found, for the most part, in the classes of specific schemes.

Building Regulation and Zoning.—In most, if not all, the schemes there will be found provisions dividing the area into districts in which the amount of open space in proportion to buildings and the use of buildings are differently regulated. This regulation, however, is not called zoning, but "the limitation of the number of houses to the acre" and "the allocation of particular sites for particular sorts of buildings."

In the limitation of the number of houses to the acre, a "house" or "dwelling house" is variously defined as a building designed for the use of not more than one family,[13] or merely as a building wholly [14] or wholly or principally [15] for human habitation; and in one case [16] it is provided that any dwelling house, if designed for more than two and not more than four families, shall be reckoned as two buildings; and if designed for more than four families, it shall be reckoned as three buildings. "Acre" in this connection sometimes means net, but more usually gross, acre.

The method of limiting the number of houses to the acre varies somewhat in the different schemes, but the principle underlying them all is the same. The provision for that purpose in the East Birmingham scheme will serve as a sufficient illustration of that general principle. In that scheme three zones were established each with an average of houses to the gross acre which in that zone as a whole must not be exceeded,

[12] Sec. 55-(2).

[13] The East Birmingham, Otley, Birmingham (North Yardley and Stechford) and North Brumsgrove (Rubery) schemes; and the Dunfermline (Scotland) scheme, in which there is also provision for tenements.

[14] The Rochdale (Marland) scheme.

[15] Chesterfield (Chester St. area) scheme.

[16] The Ruislip Northwood scheme.

the averages being 12, 15 and 18; and a maximum of twenty houses to the acre was fixed which must not be exceeded on any acre within the area covered by the scheme. When at any time the owner of the land in the area desires to erect buildings on any tract belonging to him, he is required to submit plans of the contemplated development of his entire tract; and in some schemes neighboring owners are required to do likewise if this information is needed at that time. All the land of the owner desiring to build is then divided into units, and the responsible authority sanctions the maximum number of dwellings which may be located on any such unit, or on each acre or other portion of it if this seems desirable; and also sanctions the number and defines the character of purpose of other buildings to be erected. The reason for this division of the land into units is both to prevent the owner from erecting more houses than he is entitled to on the tract in question, or on his land as a whole, and to keep him from unduly congesting any particular part of it, while still leaving him as free as possible in the subsequent development of his property. In some schemes, in addition to the limitation of the number of houses to the acre, there are limitations on the amount of the lot that may be covered by certain buildings, and height limitations.

Methods of use zoning, or "allocation of particular sites for particular sorts of buildings" also differ in different schemes, partly because practice is still in process of evolution, partly because the areas to be planned differ and it is possible to frame methods especially for them. In the East Birmingham scheme, for instance, there are certain districts primarily for residence and others for manufacturing, but shops, etc., in the residential areas are located by the responsible authority by special order; while in the Ruislip Northwood scheme, there are four classes of use districts, one for dwellings, one for dwellings and shops, one for business and one unrestricted, for manufacturing. Existing uses are allowed to continue; but, since the areas are undeveloped, the problem of the nonconforming uses is not a difficult one.

Payment of Costs.—The principal expense of carrying out the schemes so far approved is the construction of the

necessary streets with their sewers, water pipes, light fixtures, etc. As a rule the principal streets are to be built by the responsible authority, the minor ones by the land owners, or by the responsible authority with the right to recover the expense without interest from the land owner when he builds.

The act provides [17] that "Where, by the making of any town planning scheme, any property is increased in value, the responsible authority . . . shall be entitled to recover from any person whose property is so increased in value one-half of the amount of that increase." This should be a great aid in the payment of the cost of planning and construction.

Æsthetics.—One of the general objects which the planning law seeks to accomplish is to promote the "amenity" of the areas planned.[18] The law, also, by stating [19] that no compensation shall be due on account of the provisions in a scheme prescribing the "character" of buildings, impliedly authorizes the insertion of æsthetic provisions. In addition, the fourth schedule of the act of 1909 includes as one of the matters to be dealt with by general provisions, "The preservation of objects of historical interest or natural beauty." Thus the planning authorities are given considerable power of æsthetic regulation.

Administration.—From the account already given it is evident that, directly and immediately, the scheme establishes only the most general features of the plan, the details being fixed and subsequently carried out in accordance with administrative methods which are also provided for in the scheme and in many particulars especially devised for the area in question. Thus the districts where an average of 12, 15 or 18 dwelling houses to the acre is to be maintained, are immediately established by clauses in the scheme itself; but the land units, fixing densities in detail, are established subsequently and by the responsible authority from time to time, the scheme merely creating the machinery for establishing them; and residential and industrial areas are immediately created by the scheme, but

[17] Sec. 58-(3).
[18] Sec. 54-(1).
[19] Sec. 59-(2).

the sites of shops, etc., are to be fixed subsequently by the responsible authority. This is true of the planning of many, if not all, the features included in the act and scheme under it, such as streets, building lines, the expense of planning, etc. In many cases there is an appeal from the action of the responsible authority to the Ministry of Health or the courts, or, in one or two cases, to Parliament.[20]

[20] In any careful study of the English Planning Act, an examination of the various schemes in existence is essential. The American reader will find reprints of several such schemes, in some cases annotated, in *Town Planning* by George Cadbury, Jr. (Longmans, Green & Co., London and New York, 1915) and *The Case for Town Planning* by Henry B. Aldridge (published by the National Housing and Town Planning Council, 1915); others are referred to above, and may be obtained by the student desiring them. For the use of the reader who does not have the time or opportunity for consulting the schemes themselves, a summary of the East Birmingham scheme, as amended May 30, 1918, by the East Birmingham Amendment Scheme, is given.

SUMMARY OF EAST BIRMINGHAM SCHEME

Responsible Authority; Area.—The responsible authority is the Corporation of the City of Birmingham. The area selected for planning is shown on maps annexed to the scheme, and, with the areas in two other schemes, includes about half of the undeveloped suburbs within the city limits.

Streets; Building Lines.—Certain specified new streets, 21 in number (being the main streets) shall be constructed, or widened, by the Corporation. They shall be begun at such times as the Corporation deems best, subject to appeal by anyone deeming himself aggrieved by failure to construct. Any such street shall in any event be completed and sewers, water connections, etc., constructed, when not less than 75 per cent. of the total frontage on it has been built up or appropriated as yards, etc., for buildings.

Subject to the right of appeal, all streets made by the land owners shall be constructed in accordance with the scheme and with the requirements of the Corporation. Building lines shall be fixed as specified in the scheme; and on existing streets where none are indicated the Corporation may establish them when any plan for building on it is submitted to it for approval; provided that such line shall not be less than 36 feet, or, except by agreement, more than 41 feet, from the center of the street. Where the building lines shown on plans submitted vary from those of the scheme they shall be subject to the approval of the Corporation.

The Corporation, whenever the plan of a new street is submitted to it for approval, may require the owners of any lands within the area the development of which will be affected by the construction of such street, to submit plans showing a scheme for their development.

Payment of Cost of Streets.—Certain streets shall be built and paid for by the Corporation without recourse to the land owners; certain others shall be built and paid for by the Corporation in the first instance, but every owner benefited shall repay the Corporation an amount equal to his benefit from the street (but not to exceed £3 10s per yard of his frontage on the street). When his land is taxed as anything but agricultural land, the owner has certain rights of appeal if he considers his

Effect of Scheme.—Differently expressed to fit the peculiarities of the act, the provisions with regard to the effect of the adoption and confirmation of the scheme under the English

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tax unjust. The rest of the streets shall be built and paid for, in the first instance, by the land owners without recourse of any sort.

Maintenance of Streets, etc.—Any street built otherwise than by the Corporation, when finished to its satisfaction, shall be taken over and maintained by the Corporation as soon as 75 per cent. of its frontage has been built up or appropriated as yards, etc., and sewers, water connections, etc., laid; but not before that time except by agreement.

The Local Government Board may sanction any modification in detail agreed upon at any time between the Corporation and the land owners interested as to the position, construction or widening of any of the streets to be made by the Corporation; public notice having first been given and an opportunity to object afforded any person so desiring. Certain highways are to be stopped up at any time after certain new construction takes place.

Trees, Grass, Margins, etc.—In certain streets the Corporation is given power to plant and maintain grass margins, shrubs, trees, etc.; in others the landowners are required to plant them and maintain them until the street is taken over by the Corporation.

Dwelling Houses.—"Dwelling houses" shall mean houses designed for not more than one family, with such outbuildings as are reasonably required in connection with them. In reckoning the number of dwelling houses to be erected to an acre, all roads and private open spaces constructed and set apart or to be constructed or set apart by the land owner, and one-half of the width of highways repairable by the inhabitants at large upon which such lands abut, shall be included in the measurement of the acre; but no account shall be taken of public open spaces acquired otherwise than by gift subsequent to the making of this scheme, or leased by the Corporation, or of the sites of shops and other buildings hereinafter mentioned.

The number of dwelling houses on any one acre shall not exceed twenty. When a plan is submitted for approval of the Corporation in regard to the erection of any building, if the owner does not own any other land which is not included in a land unit, the land included in that plan shall constitute a land unit; otherwise the owner shall submit a plan of all his land not included in a unit and the Corporation shall determine the unit. As a rule, units do not exceed from five to seven acres.

The owner, before commencing to build on any unit, shall deposit with the Corporation a statement of the number and description of the dwelling houses or other buildings which he desires to erect on any land unit, and the Corporation shall by order sanction the maximum number of dwelling houses which may be erected on any land unit, or on each acre or other portion of the land unit, and sanction the number and define the character or purposes of the other buildings to be erected thereon; but in no case shall the Corporation approve the erection of a greater or require the erection of a less number of dwelling houses on the land unit than will give an average over the land unit of 12, 15 or 18 to the acre in units forming parts of the areas colored light gray, medium, and dark gray, respectively on map B, annexed to the scheme. Any such order is subject to appeal, binds subsequent owners and, in the absence of agreement between them, the Corporation may determine, subject to appeal, the respective rights of seller and purchaser. All orders may,

law are in result practically the same as those in other systems with regard to the effect of the establishment of the plan. Thus under the English law the scheme may become effective from

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on application of the owner, be amended or revoked, provided that the averages for the land unit just mentioned are not exceeded. By the consent of the Corporation there may be erected in the gray areas such shops or buildings other than dwelling houses as the Corporation may think fit.

Appeals.—Any person aggrieved by the determination of a land unit by the Corporation or by any proposal to give or withholding of consent to the erection of shops or buildings other than dwelling houses (but not from consent to erection of shops, etc.), may appeal to the Local Government Board.

Groups, Breaks between Houses, etc.—Not more than eight dwelling houses shall in any one place be built under one continuous roof or without a break in building from the ground upward. No part of any continuous block of more houses than four shall be built nearer to the owners' boundary than three feet. No break in buildings from the ground upward shall be less in width than six feet; provided that the Corporation may allow a break of not less than four feet where the break is between detached houses, or a detached house or continuous block of houses and another such block, neither block to contain more than five dwelling houses. No structure shall be so built as to impede ventilation or conduce to make other buildings unfit for human habitation or dangerous or injurious to health, or so as to prevent the remedying of any nuisance injurious to health, etc.

Demolition of Works.—So far as necessary for carrying this scheme into effect the Corporation may demolish or alter any building existing in the area at the date of the approval of this scheme.

Lands Set Apart for Purposes of Scheme.—Certain specified lands are set apart for playing fields, public walks, pleasure grounds, streets, etc., and the Corporation is authorized to acquire them.

Factories.—Except on lands colored pink on map B, no factory or workshop shall be erected in the area except with the consent of the Corporation as aforesaid; and except on those lands no manufacturing business shall be carried on therein without such consent; but bricks may be made on land already used for such purpose and any building now used as a factory or workshop may continue to be so used. Any person aggrieved by the withholding of any consent may appeal to the Local Government Board.

Outdoor Advertising.—No outdoor advertising which interferes with the amenity of the area is allowed; but the exhibition of traders' names on shops or factories and notices on chapels, churches and mission rooms is permitted.

Nuisances.—All private gardens, etc., shall be so kept as not to be a nuisance or annoyance to neighbors or to persons using the highways; and the Corporation may abate such nuisance at the expense of the owner.

Adjustment of Boundaries, etc.—The Corporation, for the purpose of securing the proper development of any lands within the area in connection with any new streets to be constructed by it or with any plans for streets to be constructed by land owners submitted to it for approval, may require an adjustment of boundaries; and if this is not done by agreement between the Corporation and the land owners, or between the land owners, may apply to the Local Government Board for the appointment of an arbitrator. The Corporation may agree to pay, or by arbitration

the date of the adoption of the resolution of the local authority to prepare a scheme, and compensation for all improvements begun after that date refused unless they are specially authorized; the owner of land affected is not paid for the restrictions due to the establishment of the scheme but only for property rights taken, payable when they are taken; and there is no liability for the usual height, area and use restrictions or for the few æsthetic regulations which experience has shown to be essential.

Regional Planning.—The law provides for the appoint-

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be obligated to pay, moneys in this connection; but land owners shall not be obliged to pay as a condition of such arbitration, except with their consent. For the purpose of such adjustments the Corporation may purchase interests in land, and sell or lease the same or any part thereof subject to such conditions as it sees fit; or may appropriate such interests to any public purpose approved by the Local Government Board; and until such disposition may lease the same.

Claims, Entry, etc.—Claims under sec. 58 of the act of 1909 for compensation or in respect of any increase in value of property shall be made within twelve months from the date of approval of this scheme by the Board. The Corporation may enter upon any property within the area for purposes of inspection necessitated by provisions of the scheme. Breach of conditions of the scheme is a criminal offense. Works contravening the scheme may be removed; on failure to do work as required by the scheme the Corporation may do it at the expense of the person in default, and agreements not contrary to this scheme may, subject to the approval of the Board, be made by the Corporation to carry it out.

Suspension and Application of Acts, etc.—Certain statutes, byelaws, regulations, etc., are suspended in the scheme, or are specially varied or applied within it to suit its special circumstances. Land acquired for one purpose and not needed for it may be applied to other purposes.

Any general provisions hereafter made under sec. 55 of the act of 1909 are excluded from taking effect as part of the scheme.

Obligations under this scheme may be recovered by the Corporation and may be made payable in installments.

Appeals.—Appeals are provided for by persons aggrieved by delay of the Corporation in commencing or completely constructing new streets, by requirements by it as to manner of street construction or by delay in approving of plans for the same or for building lines.

Time Scheme Becomes Effective.—The scheme shall go into effect on the day of its approval by the Board, and continue in operation until varied by any subsequent scheme.

Approved by the Local Government Board August 13, 1913.

(*Signed*) JOHN BURNS, *President.*

Certificate that objection to the scheme was made by certain interested persons, that the draft was laid before each house of Parliament, and that no action was taken by either house.

Size, etc., of Rooms in Dwellings.—In the Leeds (Buckingham House) and Dunfermline schemes there are provisions with regard to the minimum number, size and height of rooms in dwelling houses, the height of windows in such rooms, etc.

ment of a joint authority for the planning of areas within the limits of more than one local authority, but it is only recently that any such joint authority has been appointed.[21] The amendment of 1919 leaves the local authorities somewhat freer to create such an authority than they were under the law as originally passed in 1909. The power of the Ministry of Health to approve schemes with or without modifications gives that body full power to require regional plans or regional provisions in local plans whenever it considers them necessary and to insert in schemes any provisions for their execution.

Planning in British Empire Outside of England.—The English planning act of 1909 is in force in Wales,[22] and with some modifications, in Scotland;[23] but not in Ireland.[24] The act of 1919 extends to Wales [22] but not to Scotland or Ireland.[25] A special act has been passed, applicable to Scotland.[26] Planning laws similar to the English law have been passed or have been proposed and seem likely soon to be enacted in many other parts of the British Empire, including Canada.[27]

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[21] With regard to the need, in many cases, see Ministry of Health, *South Wales Regional Survey Report,* London, His Majesty's Stationery Office, 1921, p. 66.

[22] Acts of 9 Edw. VII, ch. 44 (1909) and 9 and 10 Geo. V., ch. 35 (1919).

[23] Act of 1909, sec. 67.

[24] Act of 1909, sec. 76-(2).

[25] Act of 1919, sec. 51.

[26] Housing, Town Planning, etc. (Scotland) Act, 1919, being 9 and 10 Geo. V, ch. 60. See in this connection *Law of Housing and Town Planning in Scotland* by M. Cooper and W. E. Whyte, Wm. Hodge & Co., Ltd., Edinburgh, 1920.

[27] The following Canadian laws are modeled on the English act: ALBERTA, 1913, ch. 18 (March 25); MANITOBA, 1916, ch. 114 (March 10); NEW BRUNSWICK, 1912 (2 Geo. V), ch. 19 (April 20); NOVA SCOTIA, 1912 (2 Geo. V), ch. 6 (May 3), amended, 1915 (5 Geo. V) ch. 3 (April 23); PRINCE EDWARD ISLAND, 1918, ch. 7 (April 26); SASKATCHEWAN, 1917, ch. 70 (Dec. 15), amended, 1918-19, ch. 40, 1919-20, ch. 29, now Rev. Stat. 1920, ch. 104.

Not modeled on the English act are the planning statutes of ONTARIO, 1917 (7 Geo. V), ch. 44, amended 1918 (8 Geo. V), ch. 38, 1919 (9 Geo. V), ch. 53, 1920 (10-11 Geo. V), ch. 60; see also the Municipal Act, especially the amendment of 1921 (11 Geo. V), ch. 63, sec. 10.

Other acts more or less modeled on the English act, in various parts of the British Empire, are BOMBAY, 1915, No. 1; MADRAS, act of August 28, 1920; SOUTH AUSTRALIA, 1920 (11 Geo. V), No. 1452 (Dec. 9).

Apparently not modeled upon the English act is the planning ordinance for Jerusalem, the text of which is given in the English magazine, "Garden Cities and Town Planning," for August, 1921, p. 191.

Planning in Canada.—In Canada, the planning jurisdiction of the central government, while potentially it may be considerable, has not in fact been exercised except in an advisory capacity. The Dominion has, through its Commission of Conservation, encouraged and aided planning,[28] but the actual work, and the legislation authorizing it, have been left to the individual provinces. Six of these provinces have passed planning laws based on the English planning law.[28a]

Canadian Statutes Modeled on English Law.—The earlier Canadian planning statutes modeled on the English law were similar to the original English statute as it was in 1909; the local Canadian authorities being compelled to plan only on order of the provincial authorities in individual cases after hearing. The later Canadian statutes have more and more anticipated the reforms contained in the amendment to the English law, passed in 1919, or suggested in connection with it. Under these later statutes the local authorities are often compelled to adopt either a scheme or planning bylaws, described as a "partial scheme for the whole of its area," within three years; the responsible authority is entitled to one-half the betterment due not only to the adoption but to the execution of the scheme; the condemnation procedure is amended and the authorities are allowed to take land within two hundred feet of new streets and other improvements. More freedom is also allowed in development subsequent to the beginning of the planning. This progress was greatly aided by draft legislation prepared and issued by the Dominion Commission of Conservation,[29] and by its assistance and advice generally. In some ways the Canadian legislation is a departure from British precedent. The tendency is to make the local authority the responsible authority, but to authorize and encourage it to appoint a planning commission to exercise most, if not all, the planning powers of the local authority under the act; the pay-

[28] The town planning division of the Commission has been transferred to the National Parks Branch of the Department of the Interior; and its attention will be chiefly devoted to purely Federal matters.

[28a] See note 27 on page 510.

[29] The "First Draft" of a Canadian Town Planning Act, was issued in 1914; the "Revised Edition," in 1915.

ment of the expenses of the preparation and adoption of the scheme or bylaws being compulsory on the local authority, but no other levy or borrowing of money being permitted for planning purposes without its consent. Several of the laws mention tramways as one of the matters to be dealt with in schemes or planning bylaws; and in one or two cases the zoning of central parts of localities is referred to and provided for. In Saskatchewan, where all subdivisions must be approved by the local authorities or by the central authorities, five per cent of the land subdivided, in addition to streets, etc., must be dedicated to public use, and, as in other provinces, the urban authorities are given a certain control over development in land outside, but within a certain distance of, their limits. As an indication of the increasing scope of city planning, it is interesting to note that the Saskatchewan act is entitled "The Town Planning and Rural Development Act" and that in Schedule A of that act, among the matters to be dealt with, is included "classifying land used, intended to be used or suitable to be used for different kinds of agriculture, for horticulture . . . or for timber or other resources." [30]

Canadian Planning Statutes Not Modeled on the English Law.—All the planning law of Canada is not based on the English act of 1909. Prior to that date, in the province of Ontario, communities were authorized to pass use zoning regulations, and availed themselves of that privilege; and in the Province of Quebec, cities and towns were empowered to make community plans binding upon the authorities and the owners of the land planned; and in Nova Scotia, Halifax adopted its

[30] In the Town Planning scheme for St. John, New Brunswick, Canada (1918), the area is partly within the limits of the city, partly within those of the county of St. John; the local authority is the City Council of the city for that portion of the area within the city and the Municipal Council of the city and county for that portion outside the city limits; and the responsible authority is a planning commission created by the scheme for the purpose, consisting of two members nominated by the City Council, one nominated by the Council of the city and county, and the Mayor, Commissioner of Water and Sewerage and Commissioner of Public Works of the city, and the Warden of the city and county. Without their written consent, the cost of new streets, sewers, etc., shall in no case be recovered (without interest) from the land owner until the land is subdivided or used for other than agricultural purposes.

charter, the planning sections of which have so often been quoted.

More developed than those of any other province along individual lines are the planning laws of Ontario, the most important of which are the Planning and Development Act [31] and certain sections of the Municipal Act.[32] Under the Planning and Development Act municipalities may, subject to the approval of the Ontario Railway and Municipal Board, create urban zones consisting of the land outside of, and extending beyond, their limits, in the case of—

A city, to a distance of five miles, but exclusive of any part of another city;

A town, to a distance of three miles, but exclusive of any part of a city or another town;

A village, to a distance of three miles, but exclusive of any part of a city or town, or another village.

Two or more municipalities may create a common urban zone; the area of any urban zone may be made larger or smaller than above provided.

Within its own limits and the urban zone appurtenant to it, the municipality may, subject to the approval of the Board, make a city plan, which is in effect a plan of streets and parks; and may also approve or disapprove of subdivisions. In the case of land so related to other lands in the vicinity, whether owned by the same or by different owners, that it is expedient that all such lands should be treated as one entire parcel for purposes of subdivision, provision is made for a common plan. The Municipal Act gives municipalities the power, subject to the approval of the Board, to enact height, area and use zoning regulations.

The French Planning Law of 1919.—It is a remarkable fact that France, whose people above all others love order and method, was for many years the one great nation of Europe without a city planning law.[33] Since 1909 there has been a

[31] 1917, ch. 44, amended by 1918, ch. 38, 1919, ch. 53, 1920, ch. 60.
[32] Amended, 1921.
[33] For the French method, hitherto the only one, of laying out highways and establishing building lines, see p. 66 of this work.

constant effort on the part of French "urbanistes" to obtain such a statute, and many measures to that end have been introduced in the French Chambers, only to fail of passage. It was not until the war aroused the French nation to a realization of the evils which bad sanitation in housing and city and village construction was causing throughout France, and the need of the immediate reconstruction of the devastated regions brought them face to face with the fact that only by means of a planning law could they be rebuilt properly, that a planning law applicable to all France was enacted.[34]

The new French planning law, like the Italian law of 1865, is a development and extension of the law for the expropria-

[34] The planning law, a translation of which will be found on p. 529 of this work, was passed March 14, 1919 (See *Bull. des lois* 1919, Bull. 245, No. 13850, p. 558). It is perhaps the most important of a number of notable laws passed at about this time to aid in reconstruction; such as: (1) The law of November 27, 1918, Bull. 238, No. 13350, amended March 4, 1919, Bull. 245, No. 13810, for the resubdivision of land in the devastated regions, rendered necessary by the obliteration of land marks by the war, and most useful in replanning along new lines. To supplement this law, the law of July 29, 1921, was passed, providing for excess condemnation, and making additional provisions for replanning in localities totally or partially destroyed by war. (2) The new excess and zone condemnation laws, with relation to which see p. 79 of this work. (3) The model sanitary ordinances, issued by the Minister of the Interior, known as "A" and "B"; whose importance is greatly increased by the fact that all construction paid for by the government in settlement of claims for damage caused by the war in the devastated regions must conform to these standards, much higher than any previously set in France, and that the government pays the increased cost thereby incurred. (4) The law of April 17, 1919, Bull. 248, No. 14081, for the repayment of the damages caused by the events of the war. At its basis is a principle new in jurisprudence. Heretofore, in all countries and all times, the state at war has refused to hold itself liable for any damage caused by the enemy, and has by no means been willing to take responsibility for all the acts of its own citizens performed at its direction and command. Often, it is true, governments have made payments to war sufferers, but always partially and more or less capriciously as a charity rather than as the fulfilment of a legal duty. In the present law, however (art. 1), "The Republic proclaims the equality and solidarity of all Frenchmen with regard to the burdens of the war" and (art. 2) assumes liability for all the "certain, material and direct damages" caused to them and to friendly aliens by it. The working out of this new principle in conformity with the existing principles of law, is full of interest to the student of jurisprudence. The law does not, of course, relieve Germany and its allies from any liability incurred by them, although it may make the French Government, which as between itself and its inhabitants has assumed the burden, the party to be repaid. There is a similar law in Belgium, passed May 10, 1919, and amended May 15, and June 1, 1919, Pasinomie, 1919, pp. 202, 215 and 230.

tion of land. Under it the following communities are required within three years of the promulgation of the present law to have planning schemes formulated and in force:

Every city of 10,000 inhabitants or over;

All the communes of the department of the Seine;

Cities of more than 5,000 and less than 10,000 inhabitants whose population has increased more than ten per cent in the interval between two consecutive quinquennial censuses;

Seaside and other pleasure and health resorts whose population, of whatever size, increases fifty per cent or more at certain seasons of the year;

Settlements, of whatever size, of a picturesque, artistic or historic character, listed as such by the departmental commission on natural sites and monuments;

Land or building developments by associations, corporations or individuals.

This scheme shall include:

1. A plan fixing the direction, width and character of highways to be laid out or modified, and the location, extent and plan of squares, public gardens, amusement grounds, parks and the various open spaces; and indicating the reserve lands, whether wooded or otherwise, and the sites of future public buildings, utilities and other services.

2. A program of the hygienic, archæological and æsthetic servitudes [35] to be created, as well as other conditions to which the scheme is to be subject, especially the open spaces to be preserved, the height of structures, the provisions for drinking water, sewers, the disposition of wastes, and, if necessary, the sanitation of the soil.

3. The draft of an order [36] of the mayor, made after consultation with the municipal council, fixing the application of the above measures to the plan and program.

When any settlement, of whatever size, has been totally or partially destroyed by war, fire, earthquake, or any other catastrophe, the municipality shall, within three months of the

[35] Known as easements in the common law of the English-speaking peoples.

[36] "*Projet d'arrêté.*"

date of that event, draw up a general plan of building and street lines and grades of the part to be reconstructed, accompanied by an outline of a planning scheme. Until the plan of alignment and grades has been approved, nothing but temporary shelters shall be erected without the authority of the Prefect of the department given after consultation with the departmental planning commission provided for below.

The expenses of the required schemes and plans in the case of communities destroyed by catastrophe and those listed as picturesque, artistic or historic, shall be borne by the state; in other cases subventions may be granted in accordance with regulations to be drawn up by the state.

In each department there shall be created, for the guidance of the communes in their planning, a departmental planning commission composed of the local bodies in charge of hygiene, natural sites and monuments, and civic buildings, and four mayors appointed by the state. This commission shall, of its own motion, or on their demand, hear the delegates of the departmental societies of architecture, art, archæology, history, agriculture, commerce, industry and sport, the mayors of the cities or communes interested, and the representative of the transportation companies and the various utilities and services of the state.

The commission may add to its number reporters who shall be heard on the matters investigated by them. This commission shall give its advice with regard to:

1. Schemes to be adopted by the municipalities.
2. Derogations from the general principles of planning laid down by the superior commission provided for below, necessary on account of special difficulties or local needs.
3. The æsthetic or hygenic servitudes incidental to the schemes submitted to it.
4. All other matters referred to it by the Prefect of the department.

At the Ministry of the Interior of the state there shall be created a superior planning commission of thirty members composed of senators, deputies, counsellors of state, directors of various state functions and delegates from state societies,

etc., and four city planners, architects, or others specially qualified. This commission shall establish general planning rules and regulations and shall give its advice on all schemes considered on its own motion or referred to it by the Minister in charge of the Liberated Regions.

When a scheme has been drawn up it shall, after the advice of the sanitary authorities has been taken, be submitted to:

1. Examination by the Municipal Council;

2. The usual "inquest" [37] preliminary to the declaration of public utility by the Council of State or other state authority as required in expropriations; at which all parties interested have the right to be heard, and objections are referred first to the Municipal Council and then to the Prefect for opinion and preliminary decision.

3. To the examination of the departmental planning commission.

The Municipal Council shall then give its decision on the matter as a whole; which shall thereupon go to the Council of State, where the town contains 10,000 inhabitants or more, otherwise to the Prefect for final action; approval taking the form of a declaration that the plan is of public utility.

If in any step in the planning the city does not act, the state is given power to do so, and an appropriate penalty is visited on the city. If a scheme interests more than one commune, or transcends the department, intercommunal or inter-departmental action and control are provided for.

Anyone creating or developing a group of houses is required first to deposit the plan with the authorities and obtain the approval of the Prefect of the department.

After a plan is declared of public utility, or in the case of private developments is approved by the Prefect, the owners of lands abutting on proposed highways or squares shall conform to the lines established and shall not erect new structures without a permit from the mayor.

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[37] Public hearing.

Note H

THE ENGLISH AND FRENCH GENERAL PLANNING LAWS

No. 1

The English Town Planning Acts, 1909 and 1919

The first English town planning act was passed 1909 as Part II of the Housing, Town Planning, etc., Act, 1909,[38] Part I of this act consisting of amendments to the mass of previous housing legislation codified in 1890 and subsequent housing laws up to 1909. In 1919 the Housing, Town Planning, etc., Act, 1919,[39] was enacted. That act comprises a first part amending the housing laws of 1890-1909 and a second part amending the planning law. The housing legislation is now referred to as the Housing Acts, 1890 to 1919; and the planning legislation as the Town Planning Acts, 1909 and 1919,[40] It is with the planning acts that this work is concerned. Part II of the act of 1909 as amended by the act of 1919, is therefore given in full with the exception of a few sections of no interest to the ordinary reader or student in this country, which are summarized. For the most part the housing law, closely connected with the planning provisions, but an important and voluminous subject in itself, is omitted, as is housing in general throughout this work. An exception, however, has been made of section 9.—(1) of the housing portion of the act of 1919, and the schedule relating to it, on account of its importance in the replanning of slum areas.[41]

HOUSING, TOWN PLANNING, ETC., ACT, 1919

Provisions as to the Acquisition and Disposal of Land, etc.

Sec. 9. *Provisions as to Assessment of Compensation.* (1) Where land included in any scheme made or to be made under Part I. or Part II. of the principal Act[42] (other than land included in such a scheme only for the purpose of making the scheme efficient and not on account of the sanitary condition of the premises thereon or

[38] 9 Edward VII, ch. 44.
[39] 9 and 10 George V, ch. 35.
[40] See sec. 52 of the act of 1919.
[41] As a rule no effort is here made, for fear of confusing the reader, to distinguish between the text of the act of 1909, and that of 1919, the student wishing to do so, being referred to the original acts, which are readily accessible. For clearness, however, certain sections of the acts of 1909 and 1919 have been so designated.
[42] I. e., the act of 1909.

of those premises being dangerous or prejudicial to health) is acquired compulsorily, the compensation to be paid for the land, including any buildings thereon, shall be the value at the time the valuation is made of the land as a site cleared of buildings and available for development in accordance with the requirements of the building byelaws for the time being in force in the district:

Provided that, if in the opinion of the Local Government Board it is necessary that provision should be made by the scheme for the re-housing of persons of the working classes on the land or part thereof when cleared, or that the land or a part thereof when cleared should be laid out as an open space, the compensation payable to all persons interested in any land included in the scheme (other than as aforesaid) for their respective interests therein shall be reduced by an amount ascertained in accordance with the rules set forth in the First Schedule to this Act.

FIRST SCHEDULE

Rules for Determining the Amount of Reduction of Compensation

(*a*) The value of the whole of the land included in the scheme shall first be ascertained on the basis of its value as a cleared site available for development in accordance with the requirements of the building byelaws in force in the district.

(*b*) The value of the whole of the said land shall next be ascertained on the basis of its value as a cleared site subject to the requirements of the scheme as to the provision to be made for the re-housing of persons of the working-classes or the laying out of open spaces on the land or any part thereof.

(*c*) The difference between the amounts ascertained under paragraph (*a*) and paragraph (*b*) shall then be computed.

(*d*) The amount by which the compensation payable for the respective interests in the land to which section 9.—(1) of this Act applies, as ascertained in accordance with the principle laid down in that section, is to be reduced shall be a fraction thereof equal to the amount arrived at under paragraph (*c*) when divided by the amount arrived at under paragraph (*a*).

TOWN PLANNING ACTS, 1909 AND 1919

54.—(1)[43] *Preparation and Approval of Town Planning Scheme.* A town planning scheme may be made in accordance with the provisions of this Part of this Act as respects any land which is in course of development or appears likely to be used for building

[43] This is the first section of Part II of the Act (of 1909). Part II is the town planning portion of the Act; Part I, with its fifty-three sections being devoted to housing.

purposes, with the general object of securing proper sanitary conditions, amenity, and convenience in connection with the laying out and use of the land, and of any neighboring lands.

Provided that where a piece of land already built upon or a piece of land not likely to be used for building purposes is so situate with respect to any land likely to be used for building purposes that the general object of the scheme would be better secured by its inclusion in any town planning scheme made with respect to the last mentioned land, the scheme may include such piece of land as aforesaid, and may provide for the demolition or alteration of any buildings thereon so far as may be necessary for carrying the scheme into effect.

(2) [44] A local authority within the meaning of this Part of this Act may by resolution decide—

(*a*) to prepare a town planning scheme with reference to any land within or in the neighborhood of their area in regard to which a scheme may be made under this Act; or

(*b*) to adopt, with or without any modifications, any town planning scheme proposed by all or any of the owners of any land with respect to which the local authority are themselves by this Act authorized to prepare a scheme:

Provided that—

(*i*) if any such resolution of a local authority extends to land not within the area of that local authority, the resolution shall not have effect until it is approved by the Local Government Board, and the Board may, in giving their approval, vary the extent of the land to be included within the area of the proposed town planning scheme; and

(*ii*) where any local authorities are desirous of acting jointly in the preparation or adoption of a town planning scheme, they may concur in appointing out of their respective bodies a joint committee for the purpose, and in conferring with or without restrictions on any such committee any powers which the appointing councils might exercise for the purpose, and the provisions of sections fifty-seven and fifty-eight of the Local Government Act, 1894, in regard to joint committees, shall, with the necessary modifications, apply to any joint committee so appointed.

(4) A town planning scheme prepared or adopted by a local authority shall not have effect, unless it is approved by order of the

[44] Paragraphs (2) and (3) of the act of 1909 were repealed by the act of 1919; which substituted paragraph (2), as above, for paragraph (2) in the old act. The purpose of the repeal and substitution was to remove the necessity, formerly existing under these paragraphs as they were in the act of 1909, for the local authority to obtain the previous authorization of the Local Government Board to the preparation or adoption of a town planning scheme; see sec. 42 of the act of 1919.

Local Government Board, and the Board may refuse to approve any scheme except with such modifications and subject to such conditions as they think fit to impose:

(5) A town planning scheme, when approved by the Local Government Board, shall have effect as if it were enacted in this Act.

(6) A town planning scheme may be varied or revoked by a subsequent scheme prepared or adopted and approved in accordance with this Part of this Act, and the Local Government Board, on the application of the responsible authority, or of any other person appearing to them to be interested, may by order revoke a town planning scheme if they think that under the special circumstances of the case the scheme should be so revoked.

(7) The expression "land likely to be used for building purposes" shall include any land likely to be used as, or for the purpose of providing, open spaces, roads, streets, parks, pleasure or recreation grounds, or for the purpose of executing any work upon or under the land incidental to a town planning scheme, whether in the nature of a building work or not, and the decision of the Local Government Board, whether land is likely to be used for building purposes or not, shall be final.

55.—(1) *Contents of Town Planning Schemes.* The Local Government Board may prescribe a set of general provisions (or separate sets of general provisions adapted for areas of any special character) for carrying out the general objects of town planning schemes, and in particular for dealing with the matters set out in the Fourth Schedule to this Act, and the general provisions, or set of general provisions appropriate to the area for which a town planning scheme is made, shall take effect as part of every scheme, except so far as provision is made by the scheme as approved by the Board for the variation or exclusion of any of those provisions.

(2) Special provisions shall in addition be inserted in every town planning scheme defining in such manner as may be prescribed by regulations under this Part of this Act the area to which the scheme is to apply, and the authority who are to be responsible for enforcing the observance of the scheme, and for the execution of any works which under the scheme or this Part of this Act are to be executed by a local authority (in this Part of this Act referred to as the responsible authority), and providing for any matters which may be dealt with by general provisions, and otherwise supplementing, excluding, or varying the general provisions, and also for dealing with any special circumstances or contingencies for which adequate provision is not made by the general provisions, and for suspending, so far as necessary for the proper carrying out of the scheme, any statutory enactments, byelaws, regulations, or other provisions, under whatever authority made, which are in operation in the area included in the scheme:

(3) Where land included in a town planning scheme is in the area of more than one local authority, or is in the area of a local authority by whom the scheme was not prepared, the responsible authority may be one of those local authorities, or for certain purposes of the scheme one local authority and for certain purposes another local authority, or a joint body constituted specially for the purpose by the scheme, and all necessary provisions may be made by the scheme for constituting the joint body and giving them the necessary powers and duties:

Provided that, except with the consent of the London County Council, no other local authority shall, as respects any land in the county of London, prepare or be responsible for enforcing the observance of a town planning scheme under this Part of this Act, or for the execution of any works which under the scheme or this Part of this Act are to be executed by a local authority.

56.—(1) *Procedure Regulations of the Local Government Board.* The Local Government Board may make regulations for regulating generally the procedure to be adopted with respect to the preparation or adoption of a town planning scheme, obtaining the approval of the Board to a scheme so prepared or adopted, the variation or revocation of a scheme, and any inquiries, reports, notices, or other matters required in connection with the preparation or adoption or the approval of the scheme or preliminary thereto, or in relation to the carrying out of the scheme or enforcing the observance of the provisions thereof, or the variation or revocation of the scheme.

The power of the Local Government Board of making regulations under section 56 of the Act of 1909 shall include power to make regulations as to the procedure consequent on the passing of a resolution by a local authority to prepare or adopt a town planning scheme, and provision shall be made by those regulations for securing that a local authority after passing such a resolution shall proceed with all reasonable speed with the preparation or adoption of the town planning scheme, and shall comply with any regulations as to steps to be taken for that purpose, including provisions enabling the Local Government Board in the case of default or dilatoriness on the part of the local authority to act in the place and at the expense of the local authority.

(2) Provision shall be made by those regulations—

(*a*) for securing co-operation on the part of the local authority with the owners and other persons interested in the land proposed to be included in the scheme by such means as may be provided by the regulations;

(*b*) for securing that notice of the proposal to prepare or adopt the scheme should be given at the earliest stage possible to any council interested in the land; and

(*c*) for dealing with the other matters mentioned in the Fifth Schedule to this Act.

For securing that the council of the county in which any land proposed to be included in a town planning scheme is situated (1) shall be furnished with a notice of any proposal to prepare or adopt such a scheme and with a copy of the draft scheme before the scheme is made, and (2) shall be entitled to be heard at any public local inquiry held by the Local Government Board in regard to the scheme.[45]

57.—(1) *Power to Enforce Scheme.* The responsible authority may at any time, after giving such notice as may be provided by a town planning scheme and in accordance with the provisions of the scheme—

(*a*) remove, pull down, or alter any building or other work in the area included in the scheme which is such as to contravene the scheme, or in the erection or carrying out of which any provision of the scheme has not been complied with; or

(*b*) execute any work which it is the duty of any person to execute under the scheme in any case where it appears to the authority that delay in the execution of the work would prejudice the efficient operation of the scheme.

(2) Any expenses incurred by a responsible authority under this section may be recovered from the persons in default in such manner and subject to such conditions as may be provided by the scheme.

(3) If any question arises whether any building or work contravenes a town planning scheme, or whether any provision of a town planning scheme is not complied with in the erection or carrying out of any such building or work, that question shall be referred to the Local Government Board, and shall, unless the parties otherwise agree, be determined by the Board as arbitrators, and the decision of the Board shall be final and conclusive and binding on all persons.

58.—(1) *Compensation in Respect of Property Injuriously Affected by Scheme, etc.* Any person whose property is injuriously affected by the making of a town planning scheme shall, if he makes a claim for the purpose within the time (if any) limited by the scheme, not being less than three months after the date when notice of the approval of the scheme is published in the manner prescribed by regulations made by the Local Government Board, be entitled to obtain compensation in respect thereof from the responsible authority.

(2) A person shall not be entitled to obtain compensation under this section on account of any building erected on, or contract made or other thing done with respect to, land included in a scheme, after the date of the resolution of the local authority to prepare or adopt

[45] This division, inserted by the act of 1919, is virtually (d), but is not designated in this or any way in the act.

the scheme or after the date when such resolution takes effect as the case may be, or after such other time as the Local Government Board may fix for the purpose:

Provided that this provision shall not apply as respects any work done before the date of the approval of the scheme for the purpose of finishing a building begun or of carrying out a contract entered into before such date or other time as aforesaid.

Power to Permit Development of Estates Pending Preparation and Approval of Town Planning Schemes. The Local Government Board may by special or general order provide that where a resolution to prepare or adopt a town planning scheme has been passed, or where before the passing of this Act,[46] the preparation or adoption of a town planning scheme has been authorised, the development of estates and building operations may be permitted to proceed pending the preparation or adoption and approval of the town planning scheme, subject to such conditions as may be prescribed by the order, and where such permission has been given the provisions of subsection (2) of section 58 of the Act of 1909 which relates to the rights of compensation shall have effect as if the following proviso were added thereto:

Provided also that this provision shall not apply as respects any building erected, contract made, or other thing done in accordance with a permission granted in pursuance of an order of the Local Government Board allowing the development of estates and building operations to proceed pending the preparation or adoption and approval of the scheme, and the carrying out of works so permitted shall not prejudice any claim of any person to compensation in respect of property injuriously affected by the making of the scheme.

(3) Where, by the making of any town planning scheme, any property is increased in value, the responsible authority, if they make a claim for the purpose within the time (if any) limited by the scheme (not being less than three months after the date when notice of the approval of the scheme is first published in the manner prescribed by regulations made by the Local Government Board), shall be entitled to recover from any person whose property is so increased in value one-half of the amount of that increase.

(4) Any question as to whether any property is injuriously affected or increased in value within the meaning of this section, and as to the amount and manner of payment (whether by installments or otherwise) of the sum which is to be paid as compensation under this section or which the responsible authority are entitled to recover from a person whose property is increased in value, shall be determined by the arbitration of a single arbitrator appointed by the Local

[46] I. e., the act of 1919, this paragraph being an amendment of the act of 1909, made by the act of 1919.

Government Board, unless the parties agree on some other method of determination.

(5) Any amount due under this section as compensation to a person aggrieved from a responsible authority, or to a responsible authority from a person whose property is increased in value, may be recovered summarily as a civil debt.

(6) Where a town planning scheme is revoked by an order of the Local Government Board under this Act, any person who has incurred expenditure for the purpose of complying with the scheme shall be entitled to compensation in accordance with this section in so far as any such expenditure is rendered abortive by reason of the revocation of the scheme.

59.—(1) *Exclusion or Limitation of Compensation in Certain Cases.* Where property is alleged to be injuriously affected by reason of any provisions contained in a town planning scheme, no compensation shall be paid in respect thereof if or so far as the provisions are such as would have been enforceable if they had been contained in byelaws made by the local authority.

(2) Property shall not be deemed to be injuriously affected by reason of the making of any provisions inserted in a town planning scheme, which prescribe the space about buildings or limit the number of buildings to be erected, or prescribe the height or character of buildings, and which the Local Government Board, having regard to the nature and situation of the land affected by the provisions, consider reasonable for the purpose.

(3) Where a person is entitled to compensation under this Part of this Act in respect of any matter or thing, and he would be entitled to compensation in respect of the same matter or thing under any other enactment, he shall not be entitled to compensation in respect of that matter or thing both under this Act and under that other enactment, and shall not be entitled to any greater compensation under this Act than he would be entitled to under the other enactment.

60.—(1) *Acquisition by Local Authorities of Land Comprised in a Scheme.* The responsible authority may, for the purpose of a town planning scheme, purchase any land comprised in such scheme by agreement, or be authorised to purchase any such land compulsorily in the same manner and subject to the same provisions (including any provision authorising the Local Government Board to give directions as to the payment and application of any purchase money or compensation) as a local authority may purchase or be authorised to purchase land situate in an urban district for the purposes of Part III. of the Housing of the Working Classes Act, 1890, as amended by sections two and forty-five of this Act.[47]

[47] I. e., the act of 1909.

(2) Where land included within the area of a local authority is comprised in a town planning scheme, and the local authority are not the responsible authority, the local authority may purchase or be authorised to purchase that land in the same manner as the responsible authority.

61.—(1) *Power of Local Government Board in Case of Default of Local Authority to Make or Execute Town Planning Scheme.* If the Local Government Board are satisfied on any representation, after holding a public local inquiry, that a local authority—

(*a*) have failed to take the requisite steps for having a satisfactory town planning scheme prepared and approved in a case where a town planning scheme ought to be made; or

(*b*) have failed to adopt any scheme proposed by owners of any land in a case where the scheme ought to be adopted; or

(*c*) have unreasonably refused to consent to any modifications or conditions imposed by the Board;

the Board may, as the case requires, order the local authority to prepare and submit for the approval of the Board such a town planning scheme, or to adopt the scheme, or to consent to the modifications or conditions so inserted:

Provided that, where the representation is that a local authority have failed to adopt a scheme, the Local Government Board, in lieu of making such an order as aforesaid, may approve the proposed scheme, subject to such modifications or conditions, if any, as the Board think fit, and thereupon the scheme shall have effect as if it had been adopted by the local authority and approved by the Board.

(2) If the Local Government Board are satisfied on any representation, after holding a local inquiry, that a responsible authority have failed to enforce effectively the observance of a scheme which has been confirmed, or any provisions thereof, or to execute any works which under the scheme or this Part of this Act [47a] the authority is required to execute, the Board may order that authority to do all things necessary for enforcing the observance of the scheme or any provisions thereof effectively, or for executing any works which under the scheme or this Part of this Act [47a] the authority is required to execute.

(3) Any order under this section may be enforced by mandamus.

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PART IV

SUPPLEMENTAL

73.—(1) *Provisions as to Commons and Open Spaces.* Where any scheme or order under the Housing Acts of Part II. of this

[47a] I. e., the act of 1909.

Act authorises the acquisition or appropriation to any other purpose of any land forming part of any common, open space, or allotment, the scheme or order, so far as it relates to the acquisition or appropriation of such land, shall be provisional only, and shall not have effect unless and until it is confirmed by Parliament, except where the scheme or order provides for giving in exchange for such land other land, not being less in area, certified by the Local Government Board after consultation with the Board of Agriculture and Fisheries to be equally advantageous to the persons, if any, entitled to commonable or other rights and to the public.

ACT OF 1919

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46.—(1) *Preparation of Town Planning Schemes.* The council of every borough or other urban district containing on the first day of January nineteen hundred and twenty-three a population according to the last census for the time being of more than twenty thousand shall, within three years after that date, prepare and submit to the Local Government Board a town planning scheme in respect of all land within the borough or urban district in respect of which a town planning scheme may be made under the Act of 1909.

(2) Without prejudice to the powers of the council under the Act of 1909, every scheme to which this section applies shall deal with such matters as may be determined by regulations to be made by the Local Government Board.

(3) Every regulation so made shall be laid before both Houses of Parliament as soon as may be after it is made, and, if an address is presented by either House within twenty-one days on which that House has sat next after any such regulation is laid before it praying that the regulation may be annulled, His Majesty in Council may annul the regulation, but without prejudice to the validity of anything previously done thereunder.

47.—(1) *Power of Local Government Board to Require Town Planning Scheme.* Where the Local Government Board are satisfied after holding a public local inquiry that a town planning scheme ought to be made by a local authority as respects any land in regard to which a town planning scheme may be made under the Act of 1909, the Board may by order, require the local authority to prepare and submit for their approval such a scheme, and, if the scheme is approved by the Board, to do all things necessary for enforcing the observance of the scheme or any provisions thereof effectively, and for executing any works which, under the scheme or under Part II. of the Act of 1909, the authority are required to execute.

(2) Any order made by the Local Government Board under this section shall have the same effect as a resolution of the local

authority deciding to prepare a town planning scheme in respect of the area in regard to which the order is made.

(3) If the local authority fail to prepare a scheme to the satisfaction of the Board within such time as may be prescribed by the order, or to enforce the observance of the scheme or any provisions thereof effectively, or to execute any such works as aforesaid, the Board may themselves act, or in the case of a borough or other urban district, the population of which is less than 20,000, or of a rural district, may, if the Board think fit, by order, empower the county council to act in the place and at the expense of the local authority.

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FOURTH SCHEDULE[48]

MATTERS TO BE DEALT WITH BY GENERAL PROVISIONS PRESCRIBED BY THE LOCAL GOVERNMENT BOARD

1. Streets, roads, and other ways, and stopping up, or diversion of existing highways.
2. Buildings, structures, and erections.
3. Open spaces, private and public.
4. The preservation of objects of historical interest or natural beauty.
5. Sewerage, drainage, and sewage disposal.
6. Lighting.
7. Water supply.
8. Ancillary or consequential works.
9. Extinction or variation of private rights of way and other easements.
10. Dealing with or disposal of land acquired by the responsible authority or by a local authority.
11. Power of entry and inspection.
12. Power of the responsible authority to remove, alter, or demolish any obstructive work.
13. Power of the responsible authority to make agreements with owners, and of owners to make agreements with one another.
14. Power of the responsible authority or a local authority to accept any money or property for the furtherance of the object of any town planning scheme, and provision for regulating the administration of any such money or property and for the exemption of any assurance with respect to money or property so accepted from enrollment under the Mortmain and Charitable Uses Act, 1888.
15. Application with the necessary modifications and adaptations of statutory enactments.

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[48] Act of 1909, as amended by Act of 1919.

16. Carrying out and supplementing the provisions of this Act for enforcing schemes.

17. Limitation of time for operation of scheme.

18. Coöperation of the responsible authority with the owners of land included in the scheme or other persons interested.

19. Charging on the inheritance of any land the value of which is increased by the operation of a town-planning scheme the sum required to be paid in respect of that increase, and for that purpose applying, with the necessary adaptations, the provisions of any enactments dealing with charges for improvements of land.

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No. 2. The French Planning Law of 1919

LAW WITH REGARD TO THE PLANS FOR THE EXTENSION AND SUBDIVISION OF CITIES [49]

Art. 1. Every city of 10,000 inhabitants and over shall, without prejudice to the general plan of street and building lines and grades required of all communes by art. 136, par. 13 [50] of the law of April 5, 1884, prepare a scheme of subdivision, adornment and extension.[51]

This scheme, which shall be established within three years of the promulgation of the present law, shall include:

1st. A plan which shall fix the direction, the width and the character of highways to be laid out or changed, determine the location, extent and plan of squares, public gardens, play grounds, parks, the various sorts of open spaces, and indicate the reservations, wooded or otherwise, to be established, as well as the sites of public monuments, buildings, utilities and other services;

2nd. A program determining the public hygienic, archæological and æsthetic servitudes [51a] and all the other conditions relative thereto, especially the open spaces to be reserved, the height of structures, as well as the provisions for the distribution of drinking water, the sewers, the disposition of waste products, and, if necessary, the sanitation of the soil;

3rd. The draft of an order [52] of the Mayor, made with the advice of the Municipal Council, fixing the conditions of the application of the measures to be taken to the plan and to the program.

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[49] Passed March 14, 1919, to be found in the *Bulletin des lois* for that year, p. 558 (No. 13850).

[50] The reference should be to paragraph 14.

[51] I. e., a city plan.

[51a] Known as easements in our law.

[52] "*Projet d'arrêté.*"

The same duties are imposed:

1st. On all the communes of the Department of the Seine;

2nd. On cities of over 5,000 but less than 10,000 inhabitants, the population of which has increased more than 10 per cent in the interval between two consecutive quinquennial censuses;

3rd. On seaside, mineral spring and other pleasure and health resorts whose population, of whatever size, increases 50 per cent or more at certain seasons of the year.[53]

4th. On settlements, of whatever size, of a picturesque, artistic or historic character, inscribed in a list to be drawn up by the Departmental Commissions on Natural Sites and Monuments created by the law of April 21, 1906;[54]

5th. On groups of houses or lots made or developed by associations, corporations or individuals.

ART. 2. When a settlement, whatever its population, has been totally or partially destroyed by acts of war, fire, earthquake or any other catastrophe, the municipality shall establish, within three months, the general plan of street and building lines and grades of the districts to be reconstructed, as provided by the law of April 5, 1884, accompanied by a summary of the scheme of subdivision, adornment and extension provided for in art. 1 of the present law.

An order of the Prefect, made after having received the advice of the commission instituted by art. 4 of the present law, shall determine whether the settlement is within the conditions laid down in the first sentence above and fix the date from which the time runs.

Until the plan of building and street lines and of grades is approved, no structure shall be erected except temporary shelters without the authority of the Prefect given after the advice of the commission instituted by art. 4 below has been taken.

ART. 3. The costs of preparing the plans and schemes provided for in the preceding articles are a state charge in so far as the communes indicated in art. 2 above are concerned, notwithstanding the principle laid down by art. 136, par. 13[55] of the Municipal Law of April 5, 1884.

The same is true of the settlements mentioned in No. 4 of the enumeration contained in art. 1 of the present law.

For other communes subventions may be accorded by decision of the Minister of the Interior, rendered on the application of the Pre-

[53] Under the French law of April 13, 1910, a decree of the Council of State, rendered after hearing the Academy of Medicine, the Superior Council of Public Hygiene of France and the Permanent Commission on such resorts, must be obtained, prior to founding them; and on petition of the commune a special tax on non-residents may be authorized for their development.

[54] See p. 422 of this work.

[55] Here again, the reference should be to par. 14.

fect of the department and charged to the credits voted for that purpose in the budget of the Minister of the Interior, to an amount to be fixed by a decree rendered in the form of rules of public administration.

ART. 4. In the prefecture of each department there shall be created a commission, to be presided over by the Prefect or his representative and called the "Departmental Commission for the Planning of Cities and Villages," composed of the Departmental Council of Hygiene, the Departmental Commission on Natural Sites and Monuments, the Departmental Council on Civic Buildings, and four mayors to be named by the General Council.[56]

This commission shall hear the delegates of the societies of architecture, art, archæology, history, agriculture, commerce, industry and sport and of the transportation companies of the department, as well as the mayors of the cities or communes interested, and the representatives of the different public utilities and other services of the state which it considers necessary to convoke and who ask an opportunity to present their views.

It may also add reporters,[57] with the right to be heard with regard to the matters on which they report.

This commission shall collect all the necessary documents of such a nature as to aid and guide the communes in the preparation of their schemes.

It shall give its opinion:

1st. With regard to the schemes adopted by the municipalities.

2nd. With regard to the departures which, on account of special difficulties or local needs, must be made from the principles laid down by the Superior Council created by art. 5 below.

3rd. With regard to the æsthetic or hygienic servitudes incidental to the schemes which are submitted to it.

4th. With regard to all matters which the prefect considers expedient to submit to it.

ART. 5. There shall be instituted at the Ministry of the Interior, under the presidency of the Minister or his deputy, and the vice presidency of the Minister in charge of the Liberated Regions or his deputy, a Superior Planning Commission composed of:

Two senators, chosen by the Senate;

Four deputies, chosen by the Chamber of Deputies;

Two Counsellors of State, in ordinary service, named by their colleagues;

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[56] *"Conseil Général."*

[57] The French word is *"rapporteurs."* They are persons with special information in particular lines and are usually, as here, given the right not only to report but to vote on the matter with relation to which they are employed. They need not be, technically, experts.

Four mayors, of whom three shall be named by the Minister of the Interior and one by the Minister in charge of the Liberated Regions, of whom two shall represent communes of from 20,000 to 50,000 inhabitants, and two, communes of over 50,000 inhabitants;

The Director of Departmental and Communal Administration at the Ministry of the Interior;

The Director of Public Charity and of Hygiene at the Ministry of the Interior;

Four members of the Superior Council of Public Hygiene, named by their colleagues;

Four members of the Superior Council of Fine Arts, named by their colleagues;

Four members of the General Council on Civic Buildings, named by their colleagues;

Four members, chosen from among the city planners, architects, and other persons particularly qualified, named: two by the Minister in charge of the Liberated Regions, and two by the Minister of the Interior.

The Council may add to its numbers reporters with the right to be heard on the matters in which they report.

This commission is charged with the duty of establishing general rules to guide the municipalities in the application of the present law, and of giving its advice with regard to all questions and all schemes which are referred to it by the Minister of the Interior or the Minister in charge of the Liberated Regions, either of their own motion or on the request of the commission itself, by resolution with the reasons therefor annexed.

ART. 6. When the scheme concerns only one commune, and except in the case provided for in par. 5 of art. 1, governed by art. 8 below, with regard to groups of houses, the Municipal Council, at the instance of the Mayor, shall name the expert or the society to be employed for the study and preparation of the plans and schemes.

If within two months of the promulgation of the present law this designation has not been made, the Prefect shall declare the Municipal Council in default if it does not proceed to do so within one month; after the expiration of which he shall of his own motion make the necessary designation.

If the plan has not been established within the time allowed by art. 1 and 2, above, the Prefect shall of his own motion cause the work to proceed at the expense of the commune, and it shall forfeit its right to subventions provided for in art. 3, par. 3, of the present law.

ART. 7. As soon as the plan, program and draft provided for in art. 1, have been prepared they shall be submitted, after the

advice of the bureaus of hygiene, or failing this, of the sanitary commission have been taken:

1st. To the Municipal Council for its consideration;

2nd. To an inquest,[58] in accordance with the ordinance of August 23, 1835; and

3rd. To the consideration of the commission provided for in art. 4.

The Municipal Council is then required to give its final decision.

If the Municipal Council refuses or neglects to consider the plans, the Prefect shall declare the council to be in default and give it not more than one month more, after which he shall himself examine the plan.

The same rule shall prevail if the Municipal Council refuses or neglects to give its final decision.

The Prefect shall transmit the documents, with his opinion, giving his reasons, annexed, to the Minister of the Interior who, if he thinks it desirable, shall consult the Superior Council; and the work to be done under the plan may then be declared to be of public utility by decree of the Council of State.

In all cases concerning a settlement provided for in art. 2 of the present law, the declaration of public utility shall be made by a decision of the Prefect, upon the advice of the commission instituted by art. 4, except in so far as concerns groups named in art. 1, for which in all cases a decree of the Council of State is necessary.

Art. 8. Associations, corporations or individuals who undertake the erection or the development of groups of houses shall deposit at the Mayor's office a plan of subdivision, including the connection with the public highways, and, if there is occasion for it, with the water mains of drinking water and the sewers of the commune.

Within twenty days of such deposit the plan shall be submitted to the examination of the bureau of hygiene, or in default of such to that of the sanitary commission of the locality, to the Municipal Council, and then to an inquest[58] in the manner prescribed by the circular of the Minister of the Interior of August 20, 1825.

One month after a notice, duly attested, addressed by the owner to the Mayor, without objection raised, the Prefect may order the inquest.

The plan shall then be submitted to the commission provided for by art. 4 above and approved, if necessary, by a decision of the Prefect.

The decision of the Prefect shall be made within one month after the inquest. In default of such a decision within that time the plan is deemed to have been approved. Upon the approval of the plan no structure shall be erected without the issuance by the Mayor of a permit to construct, under art. 11 of the law of February 15, 1902.

[58] Public hearing.

ART. 9. When the planning scheme is such as to affect several communes of the department, the Prefect may require a study of the scheme as a whole on behalf of the municipalities concerned, and institute, even on his own motion, intercommunal conferences with a view to the formation of syndicates of communes, in conformity to the provisions of art. 116 and 169.[59] of the law of April 5, 1884.

The scheme shall be investigated, and declared of public utility in the manner prescribed by arts. 6 and 7 of the present law.

If the plan extends beyond the limits of the department it shall be drawn up in an inter-departmental conference, in accordance with the provisions of arts. 89, 90, and 91 of the law of August 10, 1871, and then is subject, in each commune, to the requirements provided by arts. 6 and 7 of the present law.

It shall be declared of public utility by a law which shall prescribe the measures necessary for its application.

ART. 10. From the date of the publication of the act declaring a plan to be of public utility or of the decision of the Prefect approving the plan with relation to groups of houses, as provided in art. 8, the owners of land abutting on proposed highways and squares shall conform to the rules prescribed by the legislation with regard to building and street lines, and shall not erect any new structure without having first obtained a building permit from the Mayor. And thereafter no new structures shall be erected abutting on proposed highways or squares, except in accordance with the lines fixed.

To this end no structure shall be erected without a building permit from the Mayor.

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[59] The reference should be to arts. 161-163, and not 169.

CHAPTER III.

PLANNING ADMINISTRATION IN THE UNITED STATES

Planning Jurisdiction in the United States.—The United States is a federal union. It consists of areas within states, ruled both by the national and by state governments and of areas outside the limits of any state, controlled entirely by the national government except as it has voluntarily delegated power to local governments. Within the states the nation governs in matters of national, the states in matters of state and local, concern. The boundaries of state and national powers within the states are defined by the Constitution of the United States. Outside state limits, for the most part, the nation has granted localities the right of local self-government. In the District of Columbia, however, it has been held that Congress may delegate only municipal power, the general legislative power remaining necessarily in Congress.[1]

Constitutional Limitations on Planning Power.—Jurisprudence regards it as self-evident that all power—power to act legally on any subject in any way—must be located somewhere; and in a democracy conceives of the people, in so far as they have not parted with it, as possessing this complete sovereignty. In creating a government the people give it certain powers only, forbidding it to exercise the others, or limiting it in the method of exercising them. Thus no government in the United States may take property for a public use without compensation or deny to any one the equal protection of the law. These limitations and the interpretations put on them by the courts, as has already been shown, profoundly influence

[1] Stoughtenburg v. Herrick, 129 U. S. 141 (1889).

city planning in this country. To these limitations all governments in the United States are subject.[2]

Planning Powers of the United States Government.—In addition to its full planning powers outside state limits, the United States Government, by virtue of its control over matters of national importance, has (1) a power of local planning within the states and (2) a power of regional planning and (3) of investigation and advice, in all parts of the country.

Local Planning Powers of the United States Government Within the States.—Local planning is, in most of its phases, a state rather than a national matter. There are, however, many national purposes for which the United States Government may take and develop land within a city or other local area, as for instance for a post office, under its power to establish post roads, or for a fort or arsenal, under its war power. The power of the nation in so doing is not merely the power to compel the state to act for it; it may directly control persons and property in the state for these national purposes, and in its exercise it is free from state control. Thus the United States recently built a custom house in Boston—an ornament to the city, as it happened—higher than the established building limits; and New York City, being unable to take by eminent domain the right to construct a tunnel for a new subway under the post office on City Hall Square, was compelled, before the United States would grant the city that right, to give the United States a covenant agreeing in some respects to construct the subway at this point in accordance with the wishes of the national government.

Planning Power Incident to the National Control over Interstate and Foreign Commerce.—Perhaps the only power surrendered by the states to the nation which greatly affects city planning is that over interstate and foreign commerce. Commerce includes transportation, both by land and by sea, and the instruments of transportation, such as railroads, ship-

[2] Except possibly the island dependencies, to some of the minor limitations; see DeLima v. Bidwell, 182 U. S., p. 1; Dooley v. U. S. ib., p. 222; Downes v. Bidwell ib., p. 244; Huus v. N. Y., etc., SS. Co. ib., p. 392; The Diamond Rings, 183 U. S. 176 (all, 1901); Hawaii v. Mankichi, 190 U. S. 197 (1903); Dorr v. U. S., 195 U. S. 138 (1904).

ping and harbors. Probably the nature of this grant by the individual states to the United States of the power to regulate commerce, and its effect on city planning, may best be understood by considering with some fullness the resulting power of the United States and the individual states over the development of state harbors.

National and State Jurisdiction over State Harbors.— The use of water for navigation is, as has already been stated, dependent upon the use of the upland fronting on it, with the right appurtenant to this upland to build piers and wharves to deep water; in this country all waters being in law navigable which are navigable in fact.

In the Constitution of the United States the states give the United States Congress the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." Since commerce includes transportation, power to regulate foreign and interstate commerce by water includes such power as may be necessary for the purpose over all waters navigable for this commerce. These waters are sometimes called the "navigable waters of the United States" and include all navigable waters in the United States, except such as are entirely within a state with no navigable connection, natural or artificial, with another state. This jurisdiction over "the navigable waters of the United States" carries with it such jurisdiction as may be necessary over the land under water and the upland. Subject to this national power these lands and waters remain in state jurisdiction and ownership. The exclusive right of the nation in international bodies of water, with the land under it, divided as just indicated between national and state governments, extends, according to international law, for a marine league from the shore. Outside that limit the land and water belong to all nations in common.

Thus at the border of the land fronting on interstate navigable waters national and state powers meet and overlap. Over this land, with its adjacent waters, the state may regulate its local affairs; over these waters, with their adjacent land, the United States may regulate interstate and foreign commerce and its instruments. What is the line between these two juris-

dictions? In order to draw it we must very briefly consider the methods in the National Constitution of the grant of powers by the states to the United States.

The legislative powers of the Federal Government, granted to it by the states, are divided into two classes—first, those which are exclusively in the national government and may in no case be exercised by a state; and secondly, those which, if not exercised by the United States, may be employed by the states. This distinction has been clearly put by Willoughby in his work on the Constitution [3] as follows:

"Some of the powers granted by the Constitution to the General Government are expressly denied to the States. As to the exclusive character of the federal jurisdiction over these there cannot be, of course, any question. It has, however, often been a matter of difficulty of determination whether or not various of the powers given to the United States, but not expressly made exclusive or denied to the States, are so exclusively subject to federal control that the exercise of them by the States is under no circumstances permissible. Shortly stated, the principle that the Supreme Court has laid down for determining the question in each particular case as it has arisen has been the following: As regards generally the powers granted to the National Government there is a difference between those which are of such a character that the exercise of them by the States would be, under any circumstances, inconsistent with the general theory or national polity of the Constitution, and those not of such a character. As regards this latter class, the Supreme Court has held that as long as Congress does not see fit to exercise them, the States may do so. Laws thus passed by the States are, however, of course subject to suspension at any time by the enactment by Congress of laws governing the same subjects."

National and State Regulation of Pilotage, Etc.—Under this principle the commerce clause of the United States Constitution was held not to forbid the state regulation of pilotage in interstate harbors. In support of its decision to this effect the Court says: [4]

"The power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule,

[3] Vol. 1, p. 73.
[4] Cooley v. Port Wardens, 12 Howard (U. S.) 299 at p. 319 (1851).

operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation. . . .

It is the opinion of the majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the states of power to regulate pilots. . . ."

The doctrine of the above case is now the established law. In a later case [5] the court in so stating adds:

"The doctrine now firmly established is that when the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, or improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the State can act until Congress interferes and supersedes its authority; but when the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State to another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." [6]

National Regulation of Pier and Bulkhead Lines, Etc. —In this country each state has complete and exclusive authority over non-interstate navigable waters, and may regulate bulk head and pier head lines and the construction of bridges over such waters as it pleases; over these matters in interstate navigable waters the jurisdiction of the state, as we have seen, depends upon whether or not the United States has assumed jurisdiction. With regard to these matters the United States *has* seen fit to take jurisdiction by passing regulations with regard to them. These regulations prohibit the creation of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States, thus making it unlawful to build any wharf, pier, bulkhead, etc., in any port, navigable river, or other waters of the United

[5] Bowman v. R. Co., 125 U. S. 465 (1888).
[6] See also Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 204 (1894).

States, outside harbor lines established by the United States; or, when no such lines have been established, except in accordance with plans authorized by the Secretary of War. Where it is made manifest to the War Department that harbor lines should be fixed, the Secretary of War will cause them to be established. To the construction of any bridge or other structure over navigable waters of the United States Congress must consent and the plans be approved by the Secretary of War; but where the navigable part of such waters is entirely within a state the consent of the Secretary of War alone is sufficient.

State Regulation of Pier and Bulkhead Lines, Etc.—It has been held that this legislation does not indicate the purpose of Congress entirely to exclude state jurisdiction in these matters, but that to the erection of docks and piers within a state the consent of the state also is necessary. In the exercise of this power, states, and cities by their authority, may and often do fix bulkhead and pier head lines inside the federal lines, but can not, of course, authorize any structure beyond them.

Unexercised Powers of National Government over Harbors.—It is clear from the decisions cited and others that might be referred to that the United States in its legislation as to bridges, bulkhead and pier head lines, etc., has exercised only a part of its power of harbor regulation. If it so chose, it could fix the location of docks and similar structures or even build and control them. It has never done so and probably never will.[7] Its purpose at present is simply in some respects to condition the planning of harbors by state authority, not to plan them itself.

National Jurisdiction over Transportation by Land.—What has just been said with regard to national and state jurisdiction over transport by water applies also to such jurisdiction over transport by land. Undoubtedly the United States might not only regulate the interstate railroads and charter corporations to construct them but might itself build and operate them with their terminals and warehouses. This, too, it shows

[7] It has, however, authorized corporations to build bridges over navigable water.

no signs of doing. But even if the United States exercised this power over the instruments of commerce both by sea and by land, it would still remain true that the planning of cities, in harmony, so far as possible, with these national factors outside state control, would be the peculiar task of the state or of the local community to whom the state has entrusted it.

Regional Planning by Central Government.—Like all governments, the government of the United States has and exercises the power to regulate the use of and conserve land and other resources, within or without state boundaries, which belong to the nation. Our national parks, so controlled, are unrivalled in the world. At one time the federal government owned vast tracts of agricultural land, some of which still belongs to it. The United States, in aid of interstate commerce, has also built roads and made other internal improvements in all parts of the country. Proper management and control of these matters involves regional planning. The small amount of direction which the federal government has given these matters is all the regional planning which the federal government has done, but by no means all that it might do. By its power to construct and regulate the construction of the instruments of land and water transportation in interstate commerce already referred to, and especially by its power to regulate and fix passenger and freight rates in such commerce, the federal government could in large measure determine the location and growth of cities and lesser communities and the distribution of population and industry with relation to agricultural and other resources in every part of the United States. The power to fix rates is constantly being used by the central government in ways that influence the distribution of population and business. For instance, every time the national government fixes, modifies or refuses to disturb the differential of freight rates between different cities, it exerts a mighty influence of this sort. These powers have never been used as a means of carrying out any regional plan of the United States nor has there even been any attempt to make such a plan. The advantages which could be gained by the making and enforcement of a proper plan of this sort, the risks in disturbing values on such a scale

and the difficulty in obtaining agreement to any specific proposals to this end would all be enormous. Under these circumstances the wise course to pursue would be to prepare a plan which should be purely advisory—a most difficult task quite aside from its magnitude—and present it from time to time to the state and local authorities as occasion arose without attempting to decide whether anything further could ever be done, much less how it should be undertaken.

Investigation and Advice.—The United States, under the Constitution, has no general planning jurisdiction. Nevertheless it seems clear that it may investigate and experiment in planning matters, disseminate this information throughout the country and give its advice to governments and individuals seeking it. The power of investigation, experimentation and advice, inherent in other governments, has always been assumed to be inherent in ours. For instance the power of the national government to render the valuable assistance of this nature to agriculture throughout the country has never been questioned. The Dominion government of Canada, without any more authority in planning than our federal government, is exercising this power most effectively through its Commission of Conservation.[8] Largely on account of its influence, six of the provinces have passed town planning laws modeled on the English law, many of them embodying improvements suggested in England before they were enacted in the mother country. This power is also possessed by our states, as it undoubtedly is by the Canadian provinces, and should be used by the nation to supplement the states and their subdivisions in this branch of the work in ways in which the nation can act more effectively.[9]

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[8] See, however, p. 511, note 28.

[9] A proposal for the creation of a planning department of our national government, which had the support of many associations and individuals interested in housing and city planning, was embodied in a "Bill to create a Bureau of Housing and Living Conditions in the Department of Labor," introduced in the National House of Representatives (66th Cong., 1st sess., July 8, 1919, No. 7014) by Congressman Tinkham of Massachusetts, which failed of passage. That town planning was intended to be included in its scope is indicated by the speech of its introducer (Cong. Record, Vol. 58, p. 8913, July 12, 1919). Obviously planning is a necessary part of any method of permanently improving housing and living conditions. The Republican national platform also has come out in favor

Planning Jurisdiction of the States.—While the United States, as has already been pointed out, has powers which it could use to influence the planning of the territory within state limits, it never has used these powers to that end. At times the state authorities must recognize the jurisdiction of the central government. Thus if a city wishes to include in its plan the bridging of a navigable stream or the extension farther into navigable waters of the bulkhead or pier head line, federal permission must be obtained. In practice this permission is given or withheld solely with a view to its direct and obvious effect on navigation and never for the influence it would have on the city plan. Practically, therefore, the state may be said to have full planning power and jurisdiction within the state subject to such limitations as the United States and the state constitutions place on governmental action; which limitations, in so far as they are in the state constitution, the people of the state may vary or remove.

The plenary authority of the state over planning may be exercised directly or delegated to local governmental agencies. The matters to be so regulated may be classified into (1) matters of more general interest, with which the state would naturally deal directly, (2) matters of local interest which, so far as possible, the state should regulate through local authorities, (3) supervision of local planning, which is necessarily a state matter, (4) investigation, experimentation and advice in planning matters, which also is properly but not exclusively a state function.

State Planning.—What may be characterized as the actual planning—as distinguished from the supervision of planning and the collection and dissemination of information with regard to planning—which it is the province of the state to undertake and which states do in fact undertake in this country, may be in the nature either of city planning in the narrower signification of that phrase or of regional planning.

The Planning of the Capital City.—The city in which the

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of the establishment of a housing and planning bureau with advisory power in the United States Government; and, accordingly, there has been created, in the Department of Commerce, a Division of Building and Housing, in which two advisory committees, on Building Codes and on Zoning, have been appointed.

entire state is interested is the state capital. The capital of the United States is exclusively under the jurisdiction of the United States Government. In the individual states the capital city is sometimes wholly self-governed, sometimes wholly or partly under direct state control. In one state the concern of the state in the planning of the state capital is recognized in the appointment of a planning authority, purely advisory, which coöperates with the planning authorities of the city and of neighboring communities.[10]

State Regional Planning.—The resources of the state, of forest, water and power, are the patrimony of its people. In many states there are state commissions whose duty it is to conserve its resources and in some cases to apportion the use of them among the local governments and to corporations and individuals for the common good. Such features as parks are often of such size or so distributed as to serve more than one community and should be paid for and planned in the interest of the larger public they serve. In some states these parks are managed by a state commission, in others they are under county control. Obviously a state system of main highways is necessary. Sometimes, however, these highways are planned by the county. Especially important in the development of the state as a whole and of the communities within it are its railways, the location and powers of which are for the most part fixed by the state. All these possibilities of planned regulation and control are still largely neglected, and it is for the purpose of pointing out this possibility that they are here mentioned.

Planning and Home Rule.—There is a growing belief in this country in the righteousness and expediency of a full measure of local self-government in local affairs. General matters must be settled by general rules but the applications of general principles are always special and should fit the special circumstances of the case. The law that people do not want does not work. The man on the spot thinks he knows what he wants; the man at a distance may advise and persuade, but must be very careful in his commands. This theory, founded on observation and common sense, has in a few states found its

[10] California. For the law in full, see p. 603.

way into the state constitution, which guarantees a measure of home rule to certain of its local governments; but in most states it is still a precept which the legislature sometimes heeds and oftener disregards. The principle of home rule is especially applicable to city planning. The plan must be framed to fit the locality and, once framed, must be kept abreast of the local needs and enforced. The state may lay down general principles, establish minimum requirements, supervise, harmonize and direct, but should, so far as possible, leave detailed planning to local authorities.

Local Planning.—Except when prevented by home rule provisions, made a part of the state constitution, the states in this country have the legal right to confer planning powers on such local governments as they see fit, to the extent they think proper; and, having conferred these powers, they may add to or limit them in the same way. In so doing they may rely upon existing local governments or create new ones for the purpose, these governments having no vested rights in the power but only, in certain cases, to property acquired under it. It is quite usual to create local governments for special purposes, such as fire protection, the collection and disbursement of taxes for special improvements, the administration of parks, etc. These governments may be coterminous with other local governments or include outside territory as well. The overlapping sometimes —but by no means always—makes unnecessary complication and expense; but this is an objection to the expediency, not the legality, of the new government. In this way local public corporations or quasi-corporations of unquestionable validity may be created by the state to administer planning as well as perform other functions.

Metropolitan Planning.—Metropolitan planning has already been defined as the planning as a unit of a city or group of cities and smaller localities and the outside territory within its sphere of more immediate influence; and the fact has been indicated that it is the division of such a district by jurisdictional lines that occasions administrative difficulties in such unified planning. It is these difficulties which will now be taken up.

The statute which creates a city necessarily assigns to it definite limits. It is a common thing for the population of the city, in its growth, to overflow into the territory outside the city's legal limits. The difficulties which this occasions may be obviated by a seasonable extension of these limits, but this is often prevented by those living in this outside territory who enjoy the advantages of the city without paying its taxes. Where the city is enlarged in anticipation of growth and the land to be taken in is still agricultural in character, the opposition of the owners of this land may be met by taxing it at a lower rate as long as it remains agricultural, on the ground that it does not get the same advantage from city government that other land does; an agreement to that effect being made with the owners of the agricultural land to obviate the danger to them of the repeal of this provision through the influence of other land owners. In such cases the land taxed at a lower rate does not need, and should not receive, the improvements and other municipal services which the more highly taxed land obtains.[11]

Extension of City's Planning Jurisdiction Beyond Its Limits.—If the legal limits of the city cannot well be extended to include the neighboring unimproved land, unified planning may to some extent be secured by giving the city the power to pass on the platting of land within a given distance of its outer limits. This is done by making the record of deeds of such land dependent upon the approval of the platting by the planning commission or some other board or official of the city. The usual distance beyond its limits to which the city's power in this respect is allowed to extend is three miles, or if there is another city within less than six miles at any point, half the distance to the line of that other city. The merits and defects of this method of controlling the planning of land, in so far as they apply to land irrespective of its location within, or without, the city, have already been pointed out and need not be repeated. The reader will remember how incomplete that control was found to be. It remains to point out that to give one local government control over territory and people within the limits of another is both unjust and calculated to confuse

[11] See p. 41.

government in both units. Often the outside territory subjected to this control is not organized as a village, town, or similar local government; but it is always within the confines of a larger local unit—such as the county—which in many cases embraces both the city and the adjacent territory, and in the government of which the city, with its much larger population, has the greatly preponderating power. It is to be regretted that, as a rule, county government is not such in this country that planning power can wisely—as yet at least—be given it.

Creation of Metropolitan Planning Authority.—Where the adjacent territory is organized into cities and villages, a method free from the defects inherent in giving the city jurisdiction outside its limits, and by which also that complete unity of planning which extraterritorial control attains only in small part can be secured, is the creation of a local government covering the entire district which is to be planned, whose sole function shall be planning, leaving with the regular local governments their jurisdiction over all other matters.

The Pennsylvania Law.—A planning authority of the sort described was created in Pennsylvania. In 1913 an act was introduced in her legislature providing for the appointment of a suburban metropolitan planning commission, to include Philadelphia and suburban territory within twenty-five miles of its limits. As passed, however, the act applied to the suburban territory only. It provided that the governor of the state should appoint a planning commission for the district, to consist of fifteen members, of whom twelve should be residents of the district and three residents of Philadelphia. The jurisdiction of the commission covered the planning of highways, water supply, sewerage systems, open spaces, etc., in so far as the district as a whole, or more than one member of it, was affected. The commission was of right entitled to obtain information from all these municipalities and to be heard by them on all these matters. Its power was advisory. Unfortunately in 1915 the act was repealed.

The Massachusetts Proposal.—In Massachusetts a fuller solution of this problem was proposed. Massachusetts has long had a metropolitan district embracing Boston and thirty-seven

of its neighboring cities and towns. For this district she has at different times appointed a number of temporary commissions for a variety of purposes, and permanent commissions for the regulation, throughout the district, of water supply, of sewerage, of parks and of fire prevention. The Commissioners are appointed by the state. The cities and towns which constitute the district include such a considerable part of the population of the state—43 3/10 per cent in 1910—that the appointment of state commissioners is less an infringement of the principle of home rule than it would be in many other cases. Certainly, however, such problems may often be solved without violating home rule, as, for instance, by a state law providing for a commission to control a harbor in two local jurisdictions within the state, its members to be appointed by each jurisdiction in the proportion that its population bears to that of the other jurisdiction.

No commission has power to regulate and unify street construction in the metropolitan district of Boston and its neighboring towns and cities, although both the appointment of a separate commission for that purpose and the consolidation of the existing commissions, with the power to control street construction added, has been suggested. The latest suggestion was in 1912, at which time a draft of an act, never passed, was introduced into the Massachusetts legislature.[12] The proposed act provides not only for the planning but for the construction of highways and other improvements and the equitable distribution of the expense, and is well worth careful study.

Interstate Metropolitan Planning.—A number of large cities in this country are located at or near the state boundary. When the boundary line is a river with a harbor at its mouth, as in the case of New York City, the division line is more of a close connection between the two states than a division. Often the city has grown to such an extent that the metropolitan city is in three states and commuters come from all three of them daily to business. The need of planning such an area as a unit

[12] An investigation of the desirability of such a commission was ordered by Massachusetts Acts and Resolves, 1911, ch. 84. The report, with the draft act, reprinted in full on p. 589 of this work, is House No. 1615, of 1912.

is great and the difficulties are much increased by the jurisdictional lines, fixed by the United States Constitution.

One method of overcoming these difficulties is to appoint a citizen planning commission, with a membership in all the different jurisdictions. The members of such a commission, when once they have agreed upon a plan, can do much in their own localities to induce common action along the lines of the plan.

Another method of attaining, to a certain extent, unity of action, is the appointment by each state of an official commission, the commissions, so far as possible, acting as one commission.

None of these devices are thoroughly satisfactory. What is needed is a single authority, acting permanently for the entire metropolitan district. Such an authority the states of New York and New Jersey have created for the planning of New York harbor and the territory adjacent to it, constituting a metropolitan district.

The Metropolitan district of New York, includes, in addition to New York City, fifteen cities, some of them of large size, forty-one boroughs, two villages, seventeen towns, and seventeen townships. Of these local governments eleven, with by far the greater population, are in the State of New York, and the rest in the State of New Jersey. The difficulties of developing a world harbor, in need of the most modern and efficient equipment, so controlled, are apparent. The great harbors of other countries all have a port authority, with jurisdiction and funds commensurate with the task they must perform.

Faced with the task of the adequate development of the harbor of New York, the States of New York and New Jersey in 1917 each appointed a commission, to act jointly with the commission of the other state.[13] This commission, regarding the creation of a single port authority for the entire district as indispensable to the performance of the task, proposed, and has

[13] Laws, New York, 1917, ch. 426; New Jersey, 1917, ch. 130. In addition to the reports of this Commission, see the brief of its Counsel, Julius Henry Cohen, in defense of the legality of its proposals, in the Cornell Law Quarterly for May, 1920.

now obtained, legislation from the two states for the adoption of a method of overcoming the jurisdictional difficulty. In the year 1834, the States of New York and New Jersey entered into a compact settling the disputed question of jurisdiction over the waters between the two states. This compact was ratified by the United States Government and subsequently sustained by the courts. This compact has now been amended by adding to it provisions for the creation of the necessary port authority.[14] The rights of the two states and of the local communities concerned have been carefully safeguarded. There are a number of cities in this country which face problems much like those that confront New York; and the solution found by New York cannot fail to be of aid also to them.[15]

State Supervision of Local Planning.—Home rule does not preclude the state from legislating in matters of general importance, binding local governments and individuals in the conduct of their affairs; indeed all states regard it as their duty to enact and enforce such laws. Nor does home rule in principle prevent the state authorities from supervising localities in dealing with purely local matters. In this country the state exercises little of such control;[16] which however is usually a

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[14] Laws, New York, 1921, chs. 154, 203; New Jersey, 1921, chs. 151 and 152. For the text of the compact see p. 597. The compact was ratified by the United States by resolution of Congress approved by the President, August 21, 1921; and in 1922 the legislatures of New Jersey (ch. 9) and New York (ch. 43) approved the plan of development submitted by the port of New York authority and authorized and directed it to proceed with the development of the port in accordance with that plan. The acts contain an outline of the plan.

[15] In this connection a law of the State of New Jersey passed in 1912 (ch. 177) requiring all communities in that state situated on New York harbor to report contemplated improvements of lands under water to the New York-New Jersey commission already referred to, is not without interest.

[16] State Supervision of Planning of Harbors.

A New Jersey statute (1914, p. 205, ch. 123) creating a Harbor Commission, provides a method by which the state may supervise the planning of harbor facilities and land under water to any desired extent. Land under water in New Jersey is owned by the state and is granted by the state (acting through the State Riparian Commission, now succeeded by the Board of Commerce and Navigation) to individuals, and private and public corporations, in its discretion. This gives the state undoubted power to make and enforce plans.

part of the governmental system of foreign countries, even in Canada, where the customs and traditions are so like our own.

In foreign countries state supervision has proved most useful in certain phases of local planning, especially the neces-

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The statute after providing (secs. 1-2) for the appointment of the commission, its secretary, etc., proceeds as follows:

3. It shall be the duty of the commission to investigate and report annually to the Legislature the condition of the water front or harbor facilities, and any other matter incident to the movement of commerce upon all navigable rivers and waters in this State, or bounding thereon, and to recommend to the Legislature, and to the various municipalities of this State interested therein, such measures as may, in the judgment of the commission, be necessary or advisable for the preservation of proper navigation or its improvement, or the improvement of the movement of commerce upon such waters, and, concurrently with the Riparian Commission of this State, or any board or body which may succeed to the powers of said commission, the commission created by this act shall have power, by appropriate action in any court, to prevent encroachment or trespass upon the water front of any of the navigable waters of this State, or bounding thereon, or upon the riparian lands of this State, and to compel the removal of any such encroachment or trespass, and to restrain, prevent and remove any construction, erection or accretion injurious to the flow of any such waters which may be detrimental to the proper navigation thereof, and the maintenance and improvement of commerce thereon.

4. All plans for the development of any water front upon any navigable water or stream of this State, or bounding thereon, which is contemplated by any person, corporation or municipality, in the nature of individual improvement or development, or as a part of a general plan which involves the construction, change, alteration or modification of a dock, wharf, pier, bulkhead, bridge, pipe line, cable, or any other similar or dissimilar water front development, to be undertaken subsequent to the passage of this act, shall first be submitted to the said commission, and no such development or improvement enumerated within the provisions of this section, or included within a proper interpretation thereof, shall be commenced or executed without the approval of this commission first had and received, or as hereinafter provided. Upon the presentation of plans for any such improvement, the commission shall forthwith consider the same, and shall, if necessary or desirable, hold public meetings for the consideration thereof, under such rules and regulations as the commission may establish. Before any plans are approved or disapproved, the commission shall have power, except as hereinafter provided, to direct such changes or alterations in the plans submitted as it may deem necessary or advisable as a condition precedent to approval. Where such water front is under the control of any local board, commission or other governing body, created by an act of the Legislature, now or hereafter, having power to improve or develop the water front or exercising such authority that a permit or license must be granted by it before any improvement or development may be commenced, plans proposed by it or submitted to it shall be filed with the commission created under this act. The said commission created under this act, may, within ten days after the receipt by it of plans as above provided, file notice of objections to the carrying out of such improvement or development, or to the granting of such permit or license by

sary harmonizing of the plans of neighboring local governments. No other method has been discovered of accomplishing this result with so little interference with home rule. Some supervision by the state of the more strictly local phases of planning has also been found profitable.

State Research and Advice.—The making of experiments, the collection of information, and the giving of advice to local governments in planning, as in other matters of sufficient importance and difficulty, is properly a state function, although legally it may, and practically it should, be undertaken also by the nation on the one hand and by the local community on the other, each contributing something to the common fund

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the local board, commission or other governing body, and the filing of such notice shall act as a stay in the carrying out of such plans or in the granting of such permit or license until a public hearing shall have been held by the local board, commission or other governing body, sitting jointly with the commission created under this act. At such public hearing the commission created under this act may state its objections to the plans and recommend such changes, modifications or alterations as it deems necessary. The local board, commission or other governing body, together with the commission created under this act shall then either approve or disapprove the plans or grant or refuse to grant the permit or license as in their judgment seems necessary or desirable. Any development or improvement enumerated within the provisions of this section, or included within a proper interpretation thereof, which shall have been commenced or executed without first obtaining approval as provided in this section, shall be deemed to be a purpresture and a public nuisance and shall be abated in the name of the State of New Jersey in such action as shall be appropriate for that purpose; *provided, however,* this section shall not apply to or affect, any development for docks, shipping and transportation facilities heretofore inaugurated by a municipality, which is under construction in whole or in part, if such municipality has, prior to the passage of this act, filed with the Secretary of State a map showing the lands proposed to be taken for such municipal development.

5. Any county, town, township, borough, city, or other political subdivision of this State, may request the said commission to prepare and propose for such municipality a proper plan for the development and improvement of its water front upon any navigable stream, river or waters of this State, or bounding thereon, and it shall be the duty of the said commission to prepare and submit such plan or plans for the improvement and development of the water front of such municipality the navigation of the waters incident thereto, and the regulation and improvement of the traffic of commerce incident thereto. The said commission for the preparation and submission of such plans may make such charge against the municipality requesting the same as is equal to the actual cost of the preparation of such plans of improvement, and the municipality requesting the same is hereby authorized to pay the same from any funds in the treasury of the said municipality.

The remaining sections of the act (secs. 6-9) provide for repeals and appropriations.

that the others cannot give. To this function can be added with profit that of furnishing expert assistance in technical matters. The smaller communities cannot command the services of the best experts in their local problems; and yet the solution of these problems is as difficult and as important to the community as the problems of larger and richer localities. In this connection it is interesting to note that in one state a state authority with power to give advice and a certain amount of aid to local governments throughout the state in their planning, exists;[17] and that bodies with somewhat similar powers are to be found in other states.[18]

The Planning Executive.—The prevailing form of planning executive in the United States is the official commission. New forms of governmental activity in this country usually pass through two administrative phases. At first the enterprise is entirely a movement of private citizens, who inaugurate a society or committee for the purpose. Funds are raised by private subscription. Paid experts and clerical aids are employed, but the committee is unpaid. By this experiment, to which the public authorities are in no way committed, the feasibility and usefulness of the proposed governmental function is sufficiently proved to serve as a basis for the effort to induce the public authorities to adopt it. If this effort is successful, the enterprise enters upon its second phase. The form which this function now assumes depends upon its similarity to other public functions. If the new activity can be assigned to some existing department or a new department created along existing lines, this is done; if not, a new commission is formed. If as time goes on a method of knitting the new function more closely

[17] Pennsylvania. For the law in full see p. 604.

[18] The Immigration and Housing Commission of California (Laws 1917, p. 1514, ch. 740) and the Homestead Commission of Massachusetts (Laws 1911, ch. 607, 1913, ch. 595) now absorbed by the new Department of Public Welfare (1919, ch. 350, sec. 87; see also the last report of the Homestead Commission—Public Document No. 103, Seventh Annual Report for 1919, published 1920) collect and disseminate housing and planning information. The appointment of state and local housing and planning boards was proposed by the Housing Committee of the State Reconstruction Commission, of New York; see its report dated March 26, 1920, published by the state. Similar suggestions have been made in other states.

into the existing framework of government develops, this occurs; if not the function continues to be exercised by a special commission. City planning in this country is now in the second stage of this development, planning power being usually entrusted in cities (and in counties in the few instances in which they have been authorized to plan [19]) to a separate commission or board; although in a few cases this power is exercised by a city official or department or a committee of the legislative body of the city, but communities which cannot at once obtain official planning powers are still forming unofficial committees as a first step to that end.

Temporary Commissions.—In the beginning of the city planning movement planning commissions were often created for the purpose of preparing a city plan, and when this was done, ceased to exist; but the mistake of such a policy is now generally realized and almost invariably permanent commissions are now appointed. The city is not a static thing to be made, complete, according to model, once for all, but a growing and changing organism. Not only must the plan be prepared but it must be enforced on forgetful and sometimes unwilling city officials and property owners, and added to or modified as the growth and change of the city demands. All this requires the watchfulness and study of a planning executive, a duty which the commission that prepared the plan, if a proper one, is best fitted to perform. The planning commission should, therefore, from the start be a permanent one. The first permanent commission was appointed in Hartford, Connecticut, in 1907.[20] There are now hundreds of such commissions in this country.

Authority for Appointment.—Official commissions can come into existence only by virtue of law; but it does not follow in all cases that, without an express law authorizing such a commission, it will be impossible to obtain one. If the commission is to have simply advisory power (and, as will be seen, such a commission is by no means powerless), the city can in

[19] New Jersey (1918, ch. 185, art. XVI) given in full on p. 603; New York (Westchester County) 1915, ch. 109.

[20] Special Laws, 1907, No. 61, amended ib. 1909, No. 34, sec. 6 and No. 74.

all probability create it under its general powers; and in many cities planning commissions created by the legislative body of the city, or planning committees of that body appointed by it to whom it refers planning matters which come before it, exist, and have done good work without any express provision of law authorizing them.[21]

In a number of states some or all cities or other local governments are given by law or constitutional enactment the "home rule" right to adopt or amend their own charters and may, therefore, include in them a provision for a city planning commission, with more than advisory power if that is their desire; the extent of that power depending upon the laws and constitution of the particular state.[22] As a rule such cities may give planning commissions so created all the planning power which the city itself possesses. Cities under a commission form of government do not consider it a departure from principle to create planning commissions.

In several states planning commissions, for all or certain classes of cities, or individual cities, or cities and smaller communities, are provided for by express statute.[23] Under these statutes the local authorities are in some cases directed to create commissions,[24] but most of these statutes are permissive, these authorities being given the power to exercise or not as they see fit. The advantage of permissive statutes is that they compel the advocates of planning to educate the community to its use before the attempt to plan is made.

Appointment.—There are various methods of appointing or designating the members of planning commissions. When the commission comes into existence under the city's general powers, if created by the mayor its members are appointed by

[21] Examples of planning bodies so created are the Commission for Bridgeport, Connecticut, authorized by the Common Council August 18, 1913; that for Providence, Rhode Island, authorized by ordinance, ch. 599, No. 407, approved Dec. 2, 1913; and the committee of the Board of Estimate and Apportionment of New York City, authorized by it January, 1914.

[22] See on this subject generally *The Law and Practice of Home Rule* by Howard Lee McBain, Columbia University Press, New York, 1916.

[23] See Tables of Statutes.

[24] As, for instance, in Massachusetts; the citation is given in the tables just referred to.

him, or if created by the council, its members are appointed by it, or it authorizes the mayor, with or without its concurrence, to appoint them; for while there is no legal reason why there should not be more than one such planning commission in existence in the city at the same time, it is not probable that this will occur.

When commissions are formed by virtue of a statute or a charter provision, the statute or charter provides for a method of their appointment. In some cases the city council, authorized to create a commission if it sees fit, is also authorized to decide how its members shall be named; but usually the law directs that, in so far as the members are not designated by law, they shall be appointed by the mayor or by the mayor and council. Appointment solely by the mayor would seem to be the better method. The principle of centralizing both power and responsibility in government is now universally regarded as the correct one, especially in the appointment of officers for the performance of duties with regard to which the general public has little knowledge and interest. This is a part of the well known "short ballot" principle.

Membership of Commission.—The number of members of the commission is as a rule between five and fifteen, the usual number being seven or nine. In special cases, as in metropolitan planning, where several local governments are involved, there is much to be said for a large commission, although even in that case it should be avoided if politically possible; and often for special work, such as for instance the preparation of zoning regulations and maps, a representation of the various interests involved larger than that which the usual planning commission affords, seems desirable; but a sub-committee may be formed to aid in that work, without enlarging the permanent commission. That commission in city planning should as a rule be kept small; for while it is important that it should be representative, it is even more so that it should be efficient, as the large commission in executive work seldom is.

The provisions with regard to the qualifications which the members of the commission shall have for the work vary in the different laws and ordinances under which the commissions

are appointed, in some cases the appointing authority being left free to use its own judgment, in others that authority being required to select men skilled or learned in certain matters; in still others—and this is the more common provision—the law requiring that a part, generally from a half to three-quarters of the whole, shall be the incumbents of certain designated city offices, while the rest, to be selected by the appointing authority, shall be citizens holding no other city office. In a few cases the law provides that not more than one or two of these selected members may be non-residents.

The city officials who *ex-officio* are oftenest designated as members of the planning commission are (in the order of frequency) the mayor, the chief of the department of public works, the head of the park board or department, and the city attorney. Often, too, a representative of the legislative branch of the city government, or even representatives of its two branches if it is bicameral, are so made members. The periods of time for which the selected commissioners are appointed are usually made overlapping, so as to secure a measure of continuity.

The reason for including on the commission both city officials and lay members is that both the immediate and the more far-reaching points of view may be represented. The plan must be sufficiently ideal to provide for progress, sufficiently general to unify the city in its growth, sufficiently prophetic to provide for the future; but the ideals must be capable of practical fulfilment and closely related to the city as it is. There is also the danger, especially in large cities, that the officials will be too busy with what they are likely to regard as duties which are more specially theirs, to give attention to planning. The individual problems of each city may well modify the choice of members for the commission. It should be remembered, however, that the commission is entitled to the assistance and advice of the city officials. There is, for instance, little need for including the city attorney, as such, in the membership.

Powers of Commission.—The powers of commissions in matters relating to city planning under the various laws may be characterized as those of (1) general advice; (2) advice a prerequisite to action by other city authorities; (3) advice which

may be overruled only by more than a majority vote of the city council; (4) absolute control. In addition such commissions are given powers of various sorts with regard to special phases of planning, are made the agent of the city in various matters of city construction or are required to perform certain duties for the city.

General Advice.—Practically all planning commissions, including those which are granted additional powers,[25] are given the right to make a plan of the city and its environs, whether within the legal limits of the city or not. This plan as a rule may contain anything which the commissioners think bears on the planning and construction of the city, even if in some cases the city has no power to act on it. The commission may also make reports on any or all of these matters and give advice to city officials or private corporations and individuals with regard to them. The right to receive full information of the action of the city authorities on planning matters as soon as it is inaugurated and before such action becomes final, is often added.

Innocuous as this power seems, it is nevertheless most useful. A good plan backed up by intelligent publicity has of itself great influence on the community and on city officials. Gradually some of its features, more or less modified, sometimes for the better, often, unfortunately, for the worse, are carried out; and even if city improvements, rightly or wrongly so called, are made in disregard of it, blocking some of its important features, there is every probability that its influence for good will reassert itself later. Most of the earlier commissions were given merely the power of advice and nevertheless justified their existence; and a number of the later statutes are similar in this respect.[26]

Advice a Prerequisite to Action by Other City Authorities.—Most of the recent laws for the creation of planning commissions, in addition to granting them the power of "gen-

[25] Such as, for instance, those created under the Minnesota, New Jersey and New York laws, given in full on pp. 576ff.

[26] As, for instance, the commissions appointed under the Massachusetts laws. The reference is given in the Tables of Statutes. Of this character also are the laws of New Jersey, 1911, ch. 71, and 1913, chs. 72 and 170, and the later laws of California, Nebraska and Oregon, listed in the Tables of Statutes already referred to.

eral advice," provide that before any other city authority takes final action on any one of certain specified matters it shall notify the commission and await for a certain time a report from it. That report the commission is given the right and duty to submit, but the authority concerned may disregard if it sees fit.[27] This is in accordance with the best thought on the conduct of representative government. If power, and therefore responsibility, are divided between the commission and the authority concerned, the voters do not know whom to hold accountable for action or inaction and its results; but under the provision in question that authority is required to listen to the advice of experts, but must itself act and assume full responsibility for so doing; in other words, it is unable to indulge in the favorite political game of "passing the buck."

Advice to Be Disregarded Only by More Than a Majority Vote of City Council.—In several laws and ordinances for the creation of planning commissions the recommendations of the report which is a prerequisite to final action can be disregarded only by a vote of more than a majority of the city council, the usual requirement being two-thirds.[28] The purpose of such a requirement is to increase the power over city planning matters of the experts in these matters without unduly dividing authority. In certain matters where stability is especially important there is much to be said for such a provision; but its wisdom in all the many matters of city government and construction which should be within the jurisdiction of the planning commission is more doubtful; for certainly city business must be promptly done, and it is to be feared that by such a requirement either the field of usefulness of the commission would be unduly limited, or the city's business confused and delayed.

Absolute Control.—In one or two cases[29] the commis-

[27] The law of Minnesota is of this class; and also the special law for Hartford, Connecticut, already mentioned, special laws for a number of other Connecticut cities, and the law of Wisconsin, in the tables just referred to. See in this connection also the New York law, printed in full on p. 581.

[28] To this effect is the law of New Jersey printed in full on p. 578.

[29] As, for instance, in Cleveland, under the provisions of its charter and ordinance, printed in full on p. 587.

sion is given the right to make a report on the matters deemed of importance in planning, which the other city authorities must follow; or is made the power in the first instance to decide and in some cases to carry out the city's policy in these matters. Under such a system the commission is in reality the board of public works of the city, which loses the advantage of having a planning commission with the measure of detachment essential to the task of planning. Usually, too, such matters have a legislative side, and questions of policy with relation to them should be decided by a legislative body, with the advice and subject to the criticism of experts. If the commission is given complete authority in these matters this advantage is forfeited.

Method of Conferring Powers upon Commission.— The powers granted to commissions vary greatly in character and the methods of conferring them should vary accordingly. In so far as the power is that of "general advice" which other officials may profit by, but are not required to regard or even await in their action, there can be no harm and may be much good in giving this power in the broadest terms; and such is the general practice. Even matters with regard to which the city has no legal right to act are included. This is done, as a rule, by empowering the commission to make a map of the city and its environs within and without its legal limits, including in it all matters which the commission deems relevant, and also, for full measure, giving it specifically the right to investigate, report, and advise officials and private parties on all such matters.

When the report of the commission is made a prerequisite to action by other city departments this power of report, whether it may be disregarded or overruled by these departments or not, should be limited to the consideration of the more general aspects of those few matters which most vitally affect the city plan; for the number of matters which relate to the city plan are very great; indeed there is very little of the city's business which does not in some degree or detail have such a bearing, and to refer most of the business transacted by the entire body of the city's officials to any one authority would

cause intolerable friction and delay, even if these officials were under no obligation to follow its advice.

Perhaps the best method of giving this carefully defined power to the commission is to establish an official city map of those features which, unlike the commission's "general advice" map, city officials shall be compelled to follow. This map should become binding when adopted by the legislative branch of the city government, and should of course be amendable in the same way in which it is adopted. It should be the duty of the planning commission to prepare this map and suggest such additions and changes in it from time to time as seem desirable. Being binding upon the city no improvement could be inaugurated until first made legally a part of the map; and the adoption and change of this map should be forbidden until referred to the commission. More or less adequate precedents for such a map exist in legislation and practice in the country.[30] In default of such a map the matters in which a report from the commission is a prerequisite to final action may be referred to it by naming them in the statute or ordinance.

Among the features of city construction which, it seems clear, should be referred to the commission in this way are highways of all sorts, including parkways, with their building lines or setbacks,[31] sewers, water pipes, conduits, bridges, viaducts, tunnels, and other incidents; and parks, playgrounds, squares and other public open spaces; and the water front, with its pier and bulk head lines, docks, warehouses, and other harbor improvements; and public buildings; and privately owned buildings, such as street railway stations and ferry sheds, in so far as located on public property; and transit lines and other public utilities, both on public and on private property, in so far as the permit for them is issued by the city. A precedent for the inclusion of most, if not all, of these features will be

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[30] Perhaps the best is that of New York City. For a reference to the provisions with regard to the map of that city, see Tables of Statutes.

[31] Building lines or setbacks are a part of the official map of New York City. Laws, 1917, ch. 631-632 (called "Court Yards abutting streets"), given in full on p. 185.

found in legislation in this country.[32] Some statutes go further, embracing all "public improvements";[33] but this would seem to be both too broad and too indefinite.

The same care that must be exercised in deciding what features of city construction shall be referred to the commission is needed in determining in what detail these selected features shall be so referred. Certainly it should pass upon the "location" of these features, which should include change of location, enlargement, alteration, discontinuance, etc.; and upon the width and grade of highways; and upon the plotting of subdivisions of private land; for all of which there is precedent in this country.

In some laws the commission is directed to pass on the "design" [34] of features with regard to which it is given jurisdiction. This is giving the commission duties proper for an art commission to perform, and is wise only when such a course is advisable.

Miscellaneous Powers.—In the various planning laws and ordinances, commissions are given a variety of specific and limited powers and entrusted with a number of duties, some more or less closely related to planning and others having no particular connection with it. The union of the planning and park boards, as provided for in some laws,[35] is open to many objections. The planning of the details of parks, and their use and maintenance, is a task which should be entrusted, if possible, to specialists.[36] Under some laws the commission is given full power in the selection and condemnation of land for certain public purposes, such as parks.[37] This, to the extent

[32] This statement is based upon the examination of the statutes for the preparation and adoption of plans or maps and the appointment of planning commissions cited in the notes and tables of this chapter, to which the reader desiring to verify it is referred.

[33] Minnesota, 1919, ch. 292.

[34] As, for instance, in the Wisconsin statute, already referred to.

[35] Mass. Acts, 1915, ch. 165; ordinance, City of Schenectady, New York, approved December 9, 1912; 16 Connecticut Special Laws 1035 (1913, No. 351, sec. 10).

[36] The combination of planning and park boards has many of the advantages in exceptional cases, and disadvantages in most cases, that obtain in the combination of planning and art commissions referred to below.

[37] Detroit Charter, ch. X, sec. 7 (f), Akron, Ohio, Charter, sec. 102.

that it makes the commission practically the board of public works or the council of the city, is open to the same objections that have been urged against other provisions having such a result. Without citing all the powers of this nature conferred upon planning commissions in the various laws and ordinances [38] it may be said in general that in so far as possible the duties of the commission should be limited to planning.

Art Commissions.—An art commission of a city has three primary duties: to guide the city in making its public works more attractive; to prevent the defacement of the city by semi-public corporations and the occasional private corporation or individual who builds on, over or under city property; and to defend the city from the ignorance or egotism of those seeking a public location for inappropriate gifts to it. Especially difficult to exercise wisely is the authority over gifts to the city and enterprises involving the use of public property. It takes tact to refuse or impose conditions upon the acceptance of a gift in such a way as not to arouse sympathy for the donor or discourage the generosity of other possible donors. It takes constant vigilance to deal with those wishing to place, for their own profit, unattractive structures on public property. The entire matter is one concerning which the general public knows little and cares less, and it is therefore justifiable to give the expert liberal powers.

Unless located on public property, art commissions cannot —as yet at least—regulate or in any way control, under the police power, the appearance of private property, however prominently it may be in public view; for this is regarded as æsthetic regulation, forbidden by our constitution [39] In a few cases the law creating the commission authorizes it to offer its advice to individuals or corporations in such of their enterprises, in law private, as would materially affect the public interest; [40] they, of course, are under no obligation to take such advice, but sometimes recognize its value.

[38] See Detroit Charter, ch. X, sec. 7 (C); 15 Connecticut Special Laws, p. 43 (1907, No. 61, sec. 5), Minnesota 1919, ch. 292, p. 300, sec. 3.

[39] As our civilization develops, it is quite possible that the law on this subject will change; see Part VI.

[40] E. g., Ala., 1919, p. 880; Ill., 1915, p. 260.

The art commissions which have been most successful have seen the need of originality and diversity in the work by which the city was to profit. They have been careful not to create an art censorship; they have not done the work for the artist or imposed their ideas upon him, except as a last resort in the case of the hopelessly bad workman. They have rather limited themselves to giving aid in the selection of a site, and refusing to allow the city to be burdened in perpetuity with the hopelessly bad. Occasionally, when the powers of the commission were statutory or under an ordinance instead of being a grant in the state constitution, the city authorities, perhaps with the aid of the state legislature, have exempted a pet enterprise from the supervision of the commission; occasionally political pressure has overcome their well-founded opposition to a project or influenced their decision with regard to it; occasionally they have made glaring mistakes; and often they have failed to secure the best design for the city. They have, however, prevented the city from being burdened with a vast mass of hopelessly bad work, and by choosing the simple and appropriate design they have saved the city large sums of money and at the same time obtained for it a more pleasing result. In proportion to the value of the work passed upon, and even in proportion to the direct money saving to the city, it is safe to say that the expenses of successful commissions like those of New York or Philadelphia are insignificant.[41]

[41] Under some of the Art Commission laws (e. g., that of New York City, given in full on p. 584 of this work) certain members must be appointed by the appointing authority from a list proposed by certain societies not connected with the city government. This arrangement has been criticised on the ground that it unduly fetters the appointing authority and limits his responsibility, that it gives persons not connected with the government undue power, which, possibly, they may exercise for the furthering of personal interests, etc.; and praised because it secures better men for technical tasks than any other method. The device is not limited to the appointment of art commissions, but is usually employed only in technical matters.

What few legal decisions there are on the general subject sustain the legality of this procedure. Bellows v. City Council of Cincinnati, 11 Ohio State Reports, 544 (1860); In re Bulger, In re Merrill, 45 Cal. 533 (1873); see also Spring Valley Water Works v. San Francisco, 61 Cal. 3, at p. 7 (1881).

In so far, however, as a state constitution, in its "home rule" provisions or elsewhere, prescribes that local officials shall be elected by local electors or appointed by local authorities, it would seem to render

The Combination of Art and Planning Commissions. —In several statutes the planning commission is also the art commission of the city.[42] Except in small cities or towns, where it may be difficult to find suitable men in sufficient numbers to serve on the two bodies, the wisdom of this course is doubtful. It is true that beauty is and must be an integral part of construction and not an afterthought; it is true that beauty and fitness for the purposes for which the structure or other improvement is intended cannot be divorced, or either of them considered separate from location. Nevertheless the types of men who are fitted to serve on an art commission and on a planning commission are widely different, and better results will be obtained where it is possible to keep the two commissions coöperating but separate.

The state statute with regard to local art commissions is usually an empowering act, giving the local community the right to create such a commission if it sees fit; but the statute, almost invariably, provides that, once created, the consent of the commission is essential to the purchase or acceptance as a gift of works of art; and as a rule its approval of the design, and in some cases of the location of public buildings and buildings of

any such laws invalid, since they limit the right of appointment. See, for instance, New York constitution, art. X, sec. 2; People ex rel. Bolton v. Albertson, 55 N. Y. 50 (1873); Allison v. Welde, 172 N. Y. 421 (1902); Matter of Brenner, 170 N. Y. 186 (1902); Rathbone v. Wirth, 150 N. Y. 459 (1896); People ex rel. Balcom v. Mosher, 163 N. Y. 32 (1900). See, however, matter of Kane v. Gaynor, 144 App. Div. 196, 129 N. Y. Supp. 280, affd. 202 N. Y. 615 (1911), and the civil service cases cited below.

The legislature may prescribe reasonable qualifications for those who are to be appointed to office. Scott v. Saratoga Springs, 131 Appellate Division Reports (N. Y.) 347 (1909); People ex rel. Devery v. Coler, 173 N. Y. 103 (1903); Hellyer v. Prendergast, 176 Appellate Division Reports (N. Y.) 383 (1917); People ex rel. Qua v. Gaffney, 142 Appellate Division Reports (N. Y.) 122 (1911).

Civil service regulations are reasonable provisions in this connection. Rogers v. Common Council of Buffalo, 123 N. Y. 173 (1890); Chittenden v. Wurster, 153 N. Y. 664 (1897); People v. Angle, 109 N. Y. 564 (1888); People ex rel. Weintz v. Burch, 79 Appellate Division Reports (N. Y.) 156 (1903); Butler v. White, 83 Federal Reporter 578 (1897).

It should be noted that art. X, sec. 2 of the New York constitution, referred to above, does not prevent the appointment to an office created after the adoption of that constitution in such manner as the legislature may direct; see Allison v. Welde, cited above.

[42] As, for instance, the law for the planning of third class cities and smaller communities in New Jersey, given in full on p. 578 and the Ohio planning law.

individuals or private or semi-public corporations on public land, is required. There are also state art commissions, to which usually only advisory power is granted, and a national commission, whose power, also, is advisory.

Zoning Administration.—The first statute in this country providing for systematic zoning—and it is only such zoning that will be here considered—was passed by the State of New York in 1914. This statute was permissive, authorizing the city of New York, if it saw fit to do so, to prepare and adopt a zoning regulation and a plan dividing the city into height, area and use districts in accordance with its terms. The statute left the preparation and administration of the regulation entirely to the city authorities but to a certain extent specified the manner in which they should proceed in so doing. In these respects the subsequent zoning laws passed in various states in this country have followed New York. These statutes sometimes select certain cities or classes of cities on whom to confer the zoning power, sometimes extend the power also to the smaller communities.[43]

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[43] These statutes are given in the Tables of Statutes below. The New York law provides for the division of the city into "districts of such number, shape and areas as it [the city] may deem best suited to carry out the purposes" of the law; and most of the later laws in other states are similar in this respect. The California and Oregon laws, however, provide specifically for the division of the city into districts to segregate "the several classes of business, trades, or callings, the location of apartment or tenement houses, club houses, group residences, two family dwellings, single family dwellings, and the several classes of public, and semi-public buildings," etc. See with regard to this difference pp. 267, 277, 291 of this work.

The California and Oregon laws are the only ones that specifically provide for the regulation of "callings," which would include professions, etc., that are not usually called trades or business, the regulation of which is specifically mentioned in the other laws. The regulation of callings is probably covered in most cases, by other provisions of these laws.

It is most important that the law should authorize the regulation of the use of vacant land (see p. 191 on this point). The Ohio and District of Columbia laws specifically mention "premises" in this connection, which would include land. With the exception of the Massachusetts law, the other statutes in most connections probably provide for the regulation of land. The Massachusetts constitutional amendment and law under it, limit regulation to "buildings."

The New Jersey law, like the New York law in this respect, provides for the regulation of "the location of trades and industries" but not of residences. In a New Jersey case (Bell v. Town of Westfield, pending, December, 1921, in the Supreme Court of the state) it is claimed that,

Preparation and Adoption of Regulation and Plan.—The New York law of 1914 provided that the city of New York in its zoning should appoint a commission to make investigations, and prepare the regulations, and the plan for dividing the city into districts under it; that this commission should then hold public hearings and make its report to the Board of Estimate and Apportionment—the upper legislative body of the city—and go out of existence; that the Board of Estimate should be free to take such action on this report as it saw fit, but that it should not adopt a regulation or plan until it had received the report.[44]

As a rule [45] the states passing zoning laws, influenced by the example of New York, provide that the zone regulation shall be prepared by some commission or other body distinct from the city council and that the council shall await this report before acting in this matter. For this purpose sometimes a commission is formed, made up largely of city officials, the existence of which is continued to investigate and report on amendments as they are proposed; [46] oftener the planning commission of the city is used for the purpose. Generally, as under the New York law, the council is forbidden to act until the re-

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under this law, residential districts may be created by segregating trades and industries, but that there is no authority for creating different classes of residential districts (such as one family, and multi-family districts) or of regulating residences, by use, in any way.

The statute also provides for the regulation of the "location of buildings designed for specified uses." *Quaere*, whether this does not authorize the regulation of the location of one family and multi-family houses, as such uses.

If the present statute does not authorize the creation of such residential districts, the legislature may, if desired, pass a statute providing for such districts, if not contrary to the constitution of the state and nation. With regard to the constitutional question, see p. 291 of this work.

Such a statute (P. L. 1922, p. 277, ch. 162, amending P. L. 1920, ch. 240) has now been passed.

[44] With regard to the New York Commission and its work see p. 271.

[45] In the following laws there are no special provisions with regard to the preparation and adoption of the Zone regulation and plan; Massachusetts; New Jersey, 1920, ch. 240; New York cities law; Pennsylvania, first-class cities law; Wisconsin. In Wisconsin ten voters can petition for a zoning regulation. Under the Washington law the regulation and plan are prepared and adopted by a special body made up of the commissioners for the district and a few additions.

[46] New Jersey 1917, ch. 54; 1918, ch. 146, as amended by 1920, ch. 274; 1921, ch. 276.

port has been received; and then by a majority vote, as in other matters,[47] can take such action as it sees fit.

Amendments.—As a rule the zoning laws recognize that zoning regulations and the districts created under them, although properly subject to change, should be stabilized as much as possible. To that end they occasionally provide that the special body or planning commission that prepared the regulation and plan shall investigate and report to the council on amendments before the council shall act on them.[48] Usually, however, the action of interested property owners is relied on. Thus the New York laws provide that:

"If . . . a protest against such amendment, supplement or change be presented, duly signed and acknowledged by the owners of twenty per centum or more of any frontage proposed to be altered, or by the owners of twenty per centum of the frontage immediately in the rear thereof, or by the owners of twenty per centum of the frontage directly opposite the frontage proposed to be altered, such amendment shall not be passed except by the unanimous vote of the council."[49] In giving the property owners the right to require that amendments and changes shall be passed by more than a majority vote of the legislative body of the city, many of the zoning laws follow New York, but as a rule do not require a unanimous vote for the purpose.[50]

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[47] In Ohio a three-fourths' vote of the entire membership of the council is required to vary from the report. See also the Illinois law.

[48] New Jersey, 1917, ch. 54, New Jersey 1918, ch. 146, as amended by 1920, ch. 274. Missouri, 1921, p. 481, approved April 1.

[49] The quotation is from the New York Cities law. The law for New York City is practically the same.

[50] In Massachusetts the statute empowering cities and towns to pass zoning regulations (1920, ch. 601) provides (sec. 9) that: "If any owner of real estate in a city which would be affected by the proposed repeal or modification objects thereto, it shall not be repealed or modified except by a unanimous vote of all the members of the city council; and in no case shall an ordinance or bylaw established under the provisions of this act be repealed or modified except by a two-thirds vote of all the members of the city council, or by a two-thirds vote of the voters of a town voting thereon at an annual or special town meeting duly called for the purpose."

The meaning of the word "affected" in this connection has not as yet been judicially determined. It is to avoid all doubts of this sort that the statutes and ordinances usually specify what property owners shall be deemed to be affected, and therefore have the right to object.

Boards of Appeal.—The statutes and ordinances dealing with building are invariably full of technical details. Such details are to be found in greater number in the building code of a city than in its zoning ordinance; but, for all practical purposes, the code and the ordinance are one long and complicated regulation with which the builder must comply. A failure to observe these requirements always involves work to be done over, increased carrying charges, loss of income and heavy expenses of many sorts. It is therefore important that there should be a quick hearing and appeal from any contested decision of the city officials who enforce these ordinances. In New York City, boards of appeal, created to revise the decisions of officials acting under other statutes and municipal regulations with regard to buildings, were empowered to perform the same function in the administration of the zoning resolution; and most of the states in their zoning laws now authorize the municipalities having the right to pass zoning ordinances, to empower existing bodies to hear appeals or create bodies for the purpose. For reversal more than a majority vote is generally required.

A function of boards of appeal quite as important as the correction of errors, is that of deciding border line and exceptional cases, and of varying the requirements of zoning regulations in harmony with their spirit, in cases where to carry them out literally would cause unnecessary and excessive hardship. On this subject Edward M. Bassett, Esq., Counsel of the Zoning Committee of New York City says: [51]

"If zoning were done under eminent domain there would be no special need for a board of appeals. The only effective zoning, however, is done under the police power of the state. This power can only be invoked for the health, safety, morals and general welfare of the community. No money compensation is made to land owners although they part with somewhat of the absolute, unqualified control of their own property. All owners are supposed to be benefited by regulation in the interest of the community whereby each owner

[51] In a pamphlet, published in 1921, entitled *The Board of Appeals in Zoning*. The Zoning Committee is a voluntary organization, which exists for the purpose of aiding in the enforcement of the New York City zoning resolution, and incidentally is of great aid to zoning in other parts of this country. The second edition of this pamphlet is in press.

to some extent is compelled so to use his own as not to injure another, and therefore each owner cannot complain so long as this community power is exercised reasonably, impartially and without confiscation or arbitrariness. The zoning resolution of the city of New York, which city was the first in this country to attempt comprehensive zoning, has been pronounced constitutional by the highest court of the state because that court considered it to be a reasonable and non-confiscatory exercise of the police power.

" 'In a great metropolis like New York, in which the public health, welfare, convenience and common good are to be considered, I am of the opinion that the resolution was not an incumbrance, since it was a proper exercise of the police power. The exercise of such power, within constitutional limitations, depends largely upon the discretion and good judgment of the municipal authorities, with which the courts are reluctant to interfere. The conduct of an individual and the use of his property may be regulated.' Lincoln Trust Co. v. Williams Bldg. Corp., 229 N. Y. 313.

"Wherever the application of a zoning ordinance is arbitrary the courts are likely to declare it void in that particular. After an ordinance has been declared void in five or six particulars it has little binding force. Just here is where the need of a board of appeals comes in. However careful the council may be to avoid provisions that may turn out to be arbitrary, every builder knows that exceptional situations will arise where the written rule fails to provide the right thing in a specific case. No words of a written law can prescribe what ought to be done in the thousands of exceptions which can arise in the construction and use of buildings. The council of a large city cannot and ought not to give its time to granting specific permits for buildings. The ordinance and maps should be comprehensive and when altered the alterations should apply comprehensively and not be limited to a single building or plot. Some board that can investigate the environment, view the plot or building if necessary and express an expert opinion on the situation, should in proper cases under the guidance of the rules laid down by the council be given power to vary the strict letter of the law.

"An outlying unbuilt district may properly be zoned as residential. In it there may be a hill composed of good sand for cement blocks. It is both economy and common sense that some board should have authority to permit the temporary use of cement block making. The ordinance should give such power to a board of appeals. If there is no board of appeals, the council itself would have to consider the question of altering the sand hill from a residence district to an unrestricted district so that the cement block works might be built and operated. But this change would open up the locality for a chemical factory or some other nuisance factory that might later prevent the upbuilding of the district with good residences. The

other horn of the dilemma would be for the council to make a specific exception for the sand hill and allow cement blocks to be made temporarily. Where, however, the council itself goes into the field of making specific exceptions for particular plots or buildings all over the city, it would mean the breakdown of the zoning ordinance. The best way to handle the subject is for the council to control the ordinance and maps which should be as permanent as possible, and a board of appeals should exercise discretion on specific permits of exceptional character.

"Sometimes the dividing line between residence and business districts will run through a single lot leaving the business portion too small for a suitable store. The owner's neighbors on either side may have had stores erected before the passage of the zoning ordinance, so that his lot is not eligible for a residence. If now he cannot put up a paying store, his property is practically confiscated by the zoning ordinance. The court would very likely declare that in his case the zoning ordinance is arbitrary and void. A well drawn ordinance, however, should provide that in exceptional cases like this a board of appeals should have power to issue a permit, allowing the store building under suitable safeguards to be projected into the residence district. If there was no board of appeals, the owner could obtain a writ of mandamus against the building commissioner who refused him his permit for a store building. This would bring directly before the courts the question of whether the ordinance in this particular was arbitrary and void, and the courts would probably say that it was. If, however, there was a board of appeals given authority in the ordinance to exercise its discretion in border-line cases, the owner could not at once obtain a writ of mandamus. He must first exhaust the remedies which the law has given him. If there is a board of appeals with power to issue permits in exceptional cases like his, he must make his application to the board of appeals, which application, if meritorious, would be granted. If the board of appeals considered that the application was not meritorious, then the owner could not obtain his writ of mandamus with any chance of success. The court trying the case would say that an expert body especially constituted under the law of the state and appointed by the city had given him his day in court and had found that his application was not meritorious. His legal counsel would probably advise him against the mandamus and would apply for a writ of certiorari to review the action of the board of appeals. This review is usually predicated on the constitutionality of the ordinance. In the five years of operation of the zoning resolution of the city of New York not a single writ of mandamus under it against any one of the borough building superintendents has come up for trial. Such questions have always gone before the board of appeals where a very large proportion of them have been settled to the satisfaction of the

litigants. The decisions of the board of appeals have been reviewed by certiorari in a considerable number of cases but without damage or danger of damage to the integrity of the zoning resolution. If the city of New York did not have a board of appeals in connection with the zoning resolution with its duties defined in the charter and the resolution itself, there is no doubt that numerous cases would have come before the courts involving the constitutionality of the zoning resolution. The decisions in some of these cases would undoubtedly have been adverse. Instead of this the existence of the board of appeals has probably been the greatest element in making possible the remarkable statement that for five years there has not been any declaration of a court that any provision, however minute, of the New York zoning resolution and maps is unconstitutional.

"The two illustrations given above could be multiplied. Like all exceptional situations those arising in the planning of buildings come unexpectedly. No words can be comprehensive enough to embrace them all. Some of them arise where lots are of odd sizes and shapes. Sometimes a new building is the completion of a unit, part of which was built before the zoning ordinance, and adaptation is necessary. Sometimes a required court would only be of advantage to an existing building that had left no open space whatever. Sometimes great unnecessary expense can be avoided in the design of a business building and yet it can be adapted to the spirit of the law. Sometimes it is the prevention of public garages near schools and hospitals when located in districts which otherwise would permit them. Sometimes it is the enlargement of a store or factory on land already owned and where irremediable loss would be caused to the owners if they were compelled to move elsewhere in order to enlarge their building space. Many such situations would be fraught with danger to the zoning plan if there were no board of appeals." [52]

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[52] A board of appeals, having the right to give or withhold relief at its discretion, may grant it subject to conditions, and thus obtain results which it could not get in any other way. By this method the board of appeals of New York City has repeatedly made æsthetic requirements, such as that the façade of a business structure extending from a business into a residential district should, on the residential street, be constructed with due regard to the amenities of the residential district. Sometimes the condition is imposed to preserve the quiet and comfort of the more restricted district, as when the permit requires the business structure to have its entrances all on the business street, thus to some extent keeping employees and customers off the residential street.

It is interesting to note that in Cleveland, Ohio, a board of appeals is given the power to mitigate any hardship in the administration of a building line, or setback ordinance, which does not provide for compensation (No. 52247-A. B., passed December 6, 1920); and that the highest court in Connecticut, in upholding a statute making a building and street line plan, imposed upon property owners under the police power, binding on them, says that the plan must be presumed to be a

For the creation of boards of appeal statutory authority is necessary; it cannot be done by the vote of the legislative body of the city alone. In passing upon the validity of such a vote by the upper legislative authority of New York City, creating such a board the New York court said:

"The board of estimate having been vested by the legislature with the power of framing the regulations and restrictions provided for by the acts of 1914 and 1916, could not, in the absence of express legislative authority, depute to an inferior board the power to dispense in its discretion with compliance with such regulations. If the board of estimate had such a power to be exercised or not in its discretion, it could not delegate such discretion to a subordinate administrative or ministerial board. *Birdsall v. Clark*, 73 N. Y. 73; *Phelps v. City of New York*, 112 id. 216, 220; *Ontario Knitting Co. v. State*, 205 id. 409, 416. The question has ceased to be of importance for future cases, because of the amendment made this year to section 242b, which expressly authorizes the board of estimate to confer such power on the board of appeals." [53]

Where a board of appeals is endeavoring to obviate practical difficulties and avoid unnecessary hardships in the administration of a zoning regulation, there seems to be a tendency for it unduly to magnify its powers. In this connection Mr. Bassett says: [54]

"Before the board of appeals can make an adjustment under this provision it must first find that there is a practical difficulty or an unnecessary hardship, and after that find and prescribe an alternative method that is in harmony with the purpose and intent of the zoning resolution. If, for instance, the board of estimate has made a certain street block a business district, it is not within the power of the board of appeals to declare that the street is so depressed that it is an unnecessary hardship to prevent a lot owner from building a public garage which is prohibited in such a district. If the locality is so depressed as to warrant this statement, the board of appeals should refer the applicant to the board of estimate so that the board of estimate as the legislative authority of the city may change the district from business to unrestricted. It is not for the board of

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reasonable one because an appeal is allowed in the act to the regular courts. (Windsor v. Whitney et al., 95 Conn. 357 (1920), see also Ingham v. Brooks et al., 95 Conn. 317 (1920). For a further reference to this case, see p. 36.

[53] People ex rel. Beinert v. Miller, 100 Misc. 318 at 326.

[54] In the pamphlet just cited.

appeals to endeavor to make this piece of legislation through the form of a non-conforming permit on the ground of unnecessary hardship. Similarly if such a locality is a residence district, it is not for the board of appeals to say that stores have become so numerous, that on the ground of unnecessary hardship it will permit another store to be built by the applicant. That is alteration and not adjustment. If the district has become so much of a business district that it is an unnecessary hardship to prevent a man from building a store, then it is for the board of estimate to make it a business district and not for the board of appeals to try to accomplish the same result by exceeding its powers. The provision giving the board of appeals power to vary in cases of unnecessary hardship is a salutary one where it is meant to apply. These comprise architectural necessities in designing buildings, adaptation of buildings to irregular and unusual lots or environment, completion of architectural units already partly built and a multitude of adjustments that the human mind cannot foresee or express in words. In general what can be equally well accomplished by a change in the resolution or maps is never within the power of the board of appeals but always within the power of the board of estimate and apportionment. 'Equally well accomplished' means so accomplished for the benefit of the community and not for the benefit of the applicant."

To the same effect is a recent decision of the New York courts, in rendering which the judge says:[55]

"But the board contends it had the power to grant this application under section 20 of the zone regulations without regard to any consents. This section provides, 'Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this resolution the board of appeals shall have power in a specific case to vary any such provisions in harmony with its general purpose and intent so that the public health, safety and general welfare may be secured and substantial justice done. . . .' Apparently the board's contention is that this section gives them the power to do whatever they think is right regardless of the provisions of the statute. But it does not grant any such power. The board cannot wholly disregard the provisions of the statute or of the regulations. It can merely 'vary' them to do 'substantial justice' when the 'strict letter' of the provisions would work hardships. The provisions of this section are almost identical with those of subdivision 5 of section 719 of the charter as added by

[55] People ex rel. Cotton v. Leo, 110 Miscellaneous Reports (N. Y.) 519 (1920); affirmed 194 Appellate Division Reports (N. Y.) 921 (1920); see also Altschul v. Ludwig, 216 N. Y. 459 (1916); People ex rel. Hyman v. Leo, 108 Miscellaneous Reports (N. Y.) 39 (1919).

chapter 503 of the Laws of 1916. And under that section it has been held that the board could not disregard the provisions of the statute. People ex rel. *Cockcroft v. Miller*, 187 App. Div. 704. And the zoning resolutions have the force and effect of a statute. Matter of *Stubbe v. Adamson*, 220 N. Y. 459, 465."

On the other hand it is not for the court to substitute its judgment with regard to the proper solution of a zoning difficulty for that of the board of appeals. In reversing the decision of the judge of an inferior court who had forgotten this principle the upper court said:[56]

"There is . . . a presumption in favor of the correctness of the determination arrived at by the board of appeals, and the court should not interfere with the discretion vested in that body unless that discretion has been arbitrarily exercised or is erroneous in law. The hearings before the board of appeals are not intended merely as the first step in an application to the Supreme Court for a permit, and the Supreme Court should not upon the hearing of a writ of certiorari reverse a determination of the board of appeals, even though the justice presiding might himself have arrived at a different conclusion if the application had been submitted to him in the first instance, and he had a right to exercise his own untrammeled discretion. . . . Each application must be determined upon its own merits, and persons aggrieved by a decision of the board of appeals have a right to appeal from such decision, but such decisions in nowise affect property holders in other sections of the city and in nowise bind the board of appeals when new applications are made for similar relief. It is true that the law presumes that the board of appeals will act reasonably upon all applications brought before them, and so far as possible will arrive at its decisions in all cases by the application of the same rules and methods of reasoning, but each case must stand or fall upon its own peculiar facts, and even though I might believe that in some instances the board of appeals gave greater weight to the interest of the applicant and less weight to the position of other property holders than it has done in this case, that fact would

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[56] People ex rel. Ruth v. Leo et al., New York Supreme Court, New York County, *New York Law Journal*, March 29, 1921, pp. 2195 and 2196. See also People ex rel. Facey v. Leo, 110 Misc. 516; 230 N. Y. 602.

People ex rel. Helvetia Realty Co. v. Leo, *New York Law Journal*, June 29, 1920, p. 1101; 195 App. Div. 887.

People ex rel. Sondern v. Walsh, 108 Misc. 193.

Matter of West Side Mortgage Co. of New York v. Leo, 174 N. Y. Supp. 451.

People ex rel. Flegenheimer v. Leo, *New York Law Journal*, May 8, 1918; 186 App. Div. 893.

constitute no ground for a reversal of this decision of the board of appeals if upon the facts proven here that decision is not unreasonable as a matter of law. It follows that the writ must be dismissed, with costs."

Importance of Administration.—With the growth and ever-increasing density of population in our cities, the need of more detailed and stricter regulation of the interrelated rights of the city dwellers is more and more evident. While it is true that the failure to enact such regulations would be a failure to provide for the well-being of the inhabitants of the city, it is also true that the enforcement of these regulations is a growing burden to certain classes in the community, and an increasing expense which ultimately is borne by the city dwellers as a whole. It is therefore essential that these ordinances should receive careful study, in order that they may be simplified, and enforced justly and with the least possible hardship to those compelled to comply with them.

Note I

GENERAL PLANNING LAWS IN THE UNITED STATES

No. 1. The Minnesota Planning Law[87]

Sec. 1. *City Planning Department for Minneapolis; Commission and Membership.* That an additional executive department in the government of cities of the first class not organized under section 36 of article IV of the state constitution shall be created to be known as the "city planning department" which shall be in charge of a city planning commission, consisting of nine persons. One shall be the mayor of the municipality; the city council, the school board, the park board and the county board of the county in which the municipality is situated shall each select one of its own members, as a member of the commission, in January of each odd numbered year; and four legal voters of the municipality not members of any of the above bodies or boards shall be appointed by the mayor with consent of the city council of the municipality. The first appointments shall be made as soon as practicable after the passage of this act.

The appointed members of the commission shall serve for four years. The first members first appointed by the mayor shall so classify themselves by lot that one of the number shall go out of office

[87] 1919, ch. 292, p. 300 (Approved April 17).

at the end of January of the odd year next after their appointment; one at the end of one year thereafter, and one at the end of two years thereafter; and shall certify the result of the classification to the city clerk. Vacancies for any unexpired term shall be filled by appointment as in the first instance.

The members of the commission shall serve without compensation, but the commission may with the consent of the city council employ engineers or other persons and incur such other expenses as are deemed necessary.

The commission shall make and alter rules and regulations for its own organization and procedure. It shall make an annual report to the city council.

The term "city council" means the principal governing body of the municipality.

SEC. 2. *Powers of commission.* The city planning commission shall have power, except as otherwise provided by law:

1. To acquire or prepare a comprehensive city plan for the future physical development and improvement of the city, based primarily upon public utility, convenience and general welfare, which plan shall be known and designated as the official city plan.

2. To prepare and recommend to the proper officers of the municipality, specific plans for public improvements consistent with the comprehensive plan for the city.

3. To recommend to the city council of the municipality, ordinances regulating the height, location and ground areas of buildings and structures, and ordinances providing for the division of the city into districts or zones based upon the height, ground areas and use of all buildings and structures.

SEC. 3. *City council may grant certain powers.* The city council of the municipality may pass ordinances authorizing the city planning department to administer and enforce ordinances relative to city planning.

SEC. 4. *Commissions to approve public improvements contemplated.* No public improvements shall be authorized to be constructed in the municipality until the location and design of the same have been approved by the city planning commission, provided in case of disapproval the commission shall communicate its reasons to the city council, or other governing body which has control of the construction of the proposed improvement; and the majority vote of such body shall be sufficient to over-rule such disapproval. If the reasons for disapproval are not given to the city council or other governing body within thirty days after the plans for the public improvements are submitted to the city planning commission, said plan shall be deemed to be approved by the city planning commission, provided that the term "public improvements" shall as herein used include "works of art" as defined in chapter 154, General Laws 1901.

SEC. 5. *Plans, plats, etc., to be submitted to commission for approval or rejection.* All plans, plats, or replats, of land hereafter laid out in building lots and streets, alleys or other portions of the same intended to be dedicated to public use, or for the use of purchasers or owners of lots fronting thereon, or adjacent thereto, and located within the city limits, shall be submitted to the city planning commission for its approval; and it shall be unlawful to receive or record such plans in any public office unless the same shall bear thereon, by endorsement or otherwise, the approval of the city planning commission. The disapproval of such plan, plats, or replats, by the city planning commission, shall be deemed a refusal by the city of the proposed dedication shown thereon. The approval of the commission shall be deemed an acceptance by the city of the proposed dedication; but shall not impose any duty upon the city concerning the maintenance or improvements of any such dedicated parts, until the proper authorities of the city shall have made actual appropriations of the same by entry, use or improvements.

The duty of the city planning commission in accepting or rejecting a plat shall be deemed legislative and discretionary and not administrative.

SEC. 6. This act shall take effect and be in force from and after the date of its passage and approval.

No. 2. THE NEW JERSEY MUNICIPAL PLAN AND ART COMMISSION ACT[58]

Name of act. Application.

1. This act may be referred to as the "Municipal Plan and Art Commission Act." It shall apply to all third class cities, fourth class cities, boroughs, towns, townships and incorporated villages of this State (and only to those) which shall accept the provisions of this act as hereinafter stated.

Commission appointed.

Membership.

Appointments.

Term.

2. Any municipality mentioned in section one of this act may by a majority vote of the mayor and common council, or other similar governing body of whatsoever name called, authorize the appointment of a municipal plan and art commission for such municipality. Such commission shall consist of six men, all of whom shall reside in said municipality, and one of whom may be a member of the common council or other similar governing body of the municipality. The commissioners shall be appointed by the mayor or other head of the municipality, with the advice and consent of the council or other similar governing body, as the case may be. Each commissioner shall be appointed for a term of six years, except that when the commission shall be first created, one commissioner shall be appointed for a term of six years, one for a term of five years, one for a term of four

[58] P. L. 1915, p. 350, ch. 188, as amended P. L. 1920, p. 414, ch. 216; and supplemented P. L. 1916, p. 377, ch. 175.

years, one for a term of three years, one for a term of two years and one for a term of one year, except also, in case of any vacancy occurring in said commission, the vacancy shall be filled for the balance of the unexpired term in each instance as it arises; to the end that such commission shall be maintained as a continuing body with normally one commissioner to be nominated by the mayor and confirmed by the council in each year. In every municipality in which a municipal plan and art commission shall be appointed under the provisions of this act, the mayor or other executive head of such municipality shall also be *ex-officio* a member of such commission during his term of office.

Vacancies.

Mayor an ex officio member.

3.[59] After January first, one thousand nine hundred and twenty-one in every municipality mentioned in section one of this act which shall not have constituted a municipal plan and art commission in the manner prescribed in section two of this act, legal voters residing therein in number equaling or exceeding twenty per centum of the votes cast in the last preceding election for municipal officers may, by petition addressed to the clerk of the county in which such municipality is located, call an election of the legal voters of such municipality to vote on the question as to whether such municipality shall have a municipal plan and art commission under the provisions of this act. Such petition, with the execution thereof proven by the oath of one or more witnesses, shall be filed with said county clerk. The election shall be held at the same time as the next succeeding election of members of the General Assembly of the State of New Jersey, following the filing of said petition and by the same election officers. The ballot shall read as follows:

Petition for election to have plan and art commission.

When election held.

Ballots.

	For the appointment of a Municipal Plan and Art Commission to serve without pay.
	Against the appointment of a Municipal Plan and Art Commission to serve without pay.

and shall be printed on and as a part of the regular official ballot. If a cross mark shall be placed in the square opposite the words "For the appointment of a Municipal Plan and Art Commission, to serve without pay," the vote shall be recorded as in favor of the proposition. If a cross mark shall be placed in the square opposite the words "Against the appointment of a Municipal Plan and Art Commission, to serve without pay," the vote shall be regarded as against the

Voting.

[59] As amended, P. L. 1920, p. 414.

Result filed.

proposition. The result of such election shall be declared by a certificate or certificates signed by the election officers conducting such election and within three days after such election, such certificate or certificates shall be filed with said county clerk, and a duplicate of such certificate or certificates shall, within said three days, also be filed with the mayor or other head of the governing body of the municipality. If the majority of the votes cast at any such election on the question of appointing a commission under the provisions of this act shall be in favor of the appointment of a municipal plan and art commission, such municipal plan and art commission shall be appointed by the mayor or other head of the municipality, with the advice and consent of the council, or other similar body in such municipality, within sixty days after the date of such election.

If decided in affirmative commission appointed.

Annual estimate.

4. Between December fifteenth and December thirty-first in each year, every such commission appointed under the provisions of this act shall prepare and deliver to the mayor and council or other head of the municipality in which such commission exists, an itemized statement of the amount of money, if any, estimated to be necessary for the work of said commission for the coming calendar year from January first to December thirty-first inclusive, which statement shall be for the information of the mayor and council or other governing body of the municipality, which governing body in its discretion may appropriate in the same manner as other appropriations are made, the amount of such estimate or any portion thereof, and the amount so appropriated shall be assessed, levied and collected in the same manner as moneys appropriated for other purposes in such municipality shall be assessed, levied and collected.

Appropriation.

Question of public improvements referred to commission.

5. All questions concerning the location or acceptance of any public place, playground, parkway, street, avenue, highway, common, boulevard, square, park, or of the design, acceptance or location of any bridge, viaduct, street or park fixtures or structures, or any public building (including public library) or works of art, proposed to be erected either wholly or partly by public or private funds, for the benefit of the public in such municipality, shall be referred to such commission by the mayor and council or other similar governing body of such municipality for consideration and report before final action shall be taken thereon by the mayor and council or other similar governing body. If no report shall be made by said commission within sixty days after the receipt of such reference by the commission, the mayor and council or other similar governing body, may proceed without a report, as if this law had not been enacted. If a report shall be made by the commission, action by the mayor and council or other similar governing body in harmony with the recommendations of such report, may be taken by a majority vote, but no action by the mayor and council or such similar governing body adverse to the recommendations of such report shall be valid, unless

As to reporting.

such action shall be taken by a two-thirds vote of the mayor and council or other similar governing body.

The term "works of art" as used in this section, shall apply to and include all monuments, fountains, mural decorations, sculptures and all structures of a permanent character intended for ornament or commemoration. Definition.

This act shall take effect immediately.

[The above act has been amended by adding the following:]

1. When any municipal plan and art commission appointed under the terms of the act to which this is a supplement determines in its judgment that it is advisable and for the best interests of the city, borough or other municipality in which it is appointed, to prepare plans for the systematic and further development and betterment of such municipality, it shall then be the duty of such municipal plan and art commission to prepare such plans, and in doing so the said municipal plan and art commission may consider and investigate any subject matter tending to the development and betterment of such municipality and make such recommendations as it may deem advisable concerning its government and for any purpose make or cause to be made surveys, plans or maps. It shall have the power and authority to employ experts and clerks and to pay for their services, and to pay for such other expenses as such commission may lawfully incur under the powers hereby granted, including the necessary disbursements incurred by its members in the performance of their duties as members of said commission, provided such disbursements shall have been authorized by such commission; *and further provided,* that the total amount so expended for all purposes in any one year shall not exceed the appropriation for such year as heretofore provided. Prepare plans for systematic development of municipality. Assistants. *Proviso.*

2. This act shall take effect immediately.

No. 3. The New York City and Village Planning Law[60]

GENERAL MUNICIPAL LAW, ARTICLE 12A. CITY AND VILLAGE PLANNING COMMISSIONS

Sec. 234. Creation, appointment and qualifications.
235. Officers, expenses and assistance.
236. General powers.
237. Maps and recommendations.
238. Private streets.
239. Rules.
239-a. Construction of article.

234. *Creation, appointment and qualifications.* Each city and incorporated village is hereby authorized and empowered to create a commission to be known as the city or village planning com-

[60] 1913, ch. 699, as amended 1920, ch. 377.

mission. Such commission shall be so created in incorporated villages by resolution of the trustees, in cities by ordinance of the common council, except that in cities of the first class, having more than a million inhabitants, it shall be by resolution of the board of estimate and apportionment or other similar local authority. In cities of the first class such commission shall consist of not more than eleven, in cities of the second class of not more than nine, in cities of the third class and incorporated villages of not more than seven members. Such ordinance or resolution shall specify the public officer or body of said municipality, that shall appoint such commissioners, and shall provide that the appointment of as nearly as possible one third of them shall be for a term of one year, one third for a term of two years, and one third for a term of three years; and that at the expiration of such terms, the terms of office of their successors shall be three years; so that the term of office of one third of such commissioners, as nearly as possible, shall expire each year. All appointments to fill vacancies shall be for the unexpired term. Not more than one third of the members of said commission shall hold any other public office in said city or village. In a county containing a population of over three hundred thousand and adjoining a city of the first class one of the members of such commission may reside outside of such village.

Sec. 235. *Officers, expenses and assistance.* The commission shall elect annually a chairman from its own members. It shall have the power and authority to employ experts, clerks, and a secretary, and to pay for their services and such other expenses as may be necessary and proper, not exceeding, in all, the annual appropriation that may be made by said city or village for said commission. The body creating the commission shall by ordinance or resolution provide what compensation, if any, each of such commissioners shall receive for his services as such commissioner. Each city and incorporated village is hereby authorized and empowered to make such appropriation as it may see fit for such expenses and compensation, such appropriations to be made by those officers or bodies in such city or village having charge of the appropriation of the public funds.

Sec. 236. *General powers.* The body creating such planning commission may, at any time, by ordinance or resolution, provide that the following matters, or any one or more of them, shall be referred for report thereon, to such commission by the board, commission, commissioner or other public officer or officers of said city or village which is the final authority thereon before final action thereon by such authority: the adoption of any map or plan of said city or incorporated village, or part thereof, including drainage and sewer or water system plans or maps, and plans or maps for any public water front, or marginal street, or public structure upon, in or in connection with such front or street, or for any dredging, filling or fixing

of lines with relation to said front; any change of any such maps or plans; the location of any public structure upon, in or in connection with, or fixing lines with relation to said front; the location of any public building, bridge, statue or monument, highway, park, parkway, square, playground or recreation ground, or public open place of said city or village. In default of any such ordinance or resolution all of said matters shall be so referred to said planning commission.

The body creating such planning commission may, at any time, by ordinance or resolution, fix the time within which such planning commission shall report upon any matter or class of matters to be referred to it, with or without the further provision that in default of report within the time so fixed, the planning commission shall forfeit the right further to suspend action, as aforesaid with regard to the particular matter upon which it has so defaulted. In default of any such ordinance or resolution, no such action shall be taken until such report is so received, and no adoption, change, fixing or location as aforesaid by said final authority, prior thereto, shall be valid. No ordinance or resolution shall deprive said planning commission of its right or relieve it of its duty, to report, at such time as it deems proper upon any matter at any time referred to it.

This section shall not be construed as intended to limit or impair the power of any art commission, park commission or commissioner, now or hereafter existing by virtue of any provision of law, to refuse consent to the acceptance by any municipality of the gift of any work of art to said municipality, without reference of the matter, by reason of its proposed location or otherwise, to said planning commission. Nor shall this section be construed as intended to limit or impair any other power of any such art commission or affect the same, except in so far as it provides for reference or report, or both, on any matter before final action thereon by said art commission.

Sec. 237. *Maps and recommendations.* Such planning commission may cause to be made a map or maps of said city or village or any portion thereof, or of any land outside the limits of said city or village so near or so related thereto that in the opinion of said planning commission it should be so mapped. Such plans may show not only such matters as by law have been or may be referred to the planning commission, but also any and all matters and things with relation to the plan of said city or village which to said planning commission seem necessary and proper, including recommendations and changes suggested by it; and any report at any time made, may include any of the above. Such planning commission may obtain expert assistance in the making of any such maps or reports, or in the investigations necessary and proper with relation thereto.

Sec. 238. *Private streets.* The body creating such planning commission may at any time, by ordinance or resolution provide that

no plan, plot or description, showing the layout of any highway or street upon private property, or of building lots in connection with or in relation to such highway or street shall, within the limits of any municipality having a planning commission, as aforesaid, be received for record in the office of the clerk of the county where such real property is situated, until a copy of said plan, plot or description has been filed with said commission and it has certified, with relation thereto, its approval thereof. Such certificate shall be recorded as a part of the record of said original instrument containing said plan, plot or description. No such street or highway which has not received the approval of the planning commission shall be accepted by said city or village until the matter has been referred to such commission under the provision of section two hundred and thirty-six of this article. But if any such street is plotted or laid out in accordance with the map of said municipality, adopted according to law, then it shall not be necessary to file such copy, or obtain or record such certificate.

Sec. 239. *Rules.* Such commission may make rules not contrary to law, to govern its action in carrying out the provisions of this article.

Sec. 239-a. *Construction of article.* This article shall be construed as the grant of additional power and authority to cities and incorporated villages, and not as intended to limit or impair any existing power or authority of any city or village.

Any city or incorporated village in order to appoint a planning commission under this article shall recite, in the ordinance or resolution so creating the commission, the fact that it is created under this article.

No. 4. The New York City Art Commission Law

CHARTER, CH. XII, TITLE 2

ART COMMISSION

Sec. 633. Art commission; how constituted.
634. Members of commission; how chosen; vacancies.
635. Officers.
636. Offices to be provided; expenses, how met.
637. All works of art to be submitted to and approved by the commission.
638. Time for decision limited.
639. Removal or relocation of works of art; duty of commission.

Sec. 633. *Art Commission; how constituted.* There shall be an art commission for the city of New York, composed as follows:

1. The mayor of the city of New York, ex officio.

2. The president of the Metropolitan museum of art, ex officio.

3. The president of the New York public library (Astor, Lenox and Tilden Foundation), ex officio.

4. The president of the Brooklyn institute of arts and sciences, ex officio.

One painter, one sculptor and one architect, all residents of The City of New York; and three other residents of said city, none of whom shall be a painter, sculptor or architect or member of any other profession in the fine arts. All of the six last mentioned shall be appointed by the mayor from a list, of not less than three times the number to be appointed, proposed by the fine arts federation of New York. In all matters of which such commission takes cognizance pertaining to work under the special charge of a commissioner or department, the commissioner having such special charge shall act as a member of the commission. Each of the aforesaid presidents may appoint a trustee of the institution or corporation of which he is president to serve in his place as ex officio member of said commission. Such appointment shall be in writing and shall be revocable at any time by such president. It shall terminate whenever he ceases to be president. Until the appointment be so revoked or terminated, any trustee so appointed shall be an ex officio member of said commission with like powers and duties as the president who has appointed him.

Sec. 634. *Members of commission; how chosen; vacancies.* The painter, sculptor and architect, members of the commission, shall choose by lot one, two and three year terms of office; the three other appointed members of the commission shall also choose by lot one, two and three year terms of office, and the appointment of their successors, after the expiration of the first year of this commission, shall be for a term of three years. All appointments to fill vacancies shall be for the unexpired term. In case any vacancy shall occur in the commission, by reason of death, resignation, incapacity, refusal to serve, or otherwise, the vacancy shall be filled by appointment, as provided in section six hundred and thirty-three of this act. In case the fine arts federation shall fail to present a list of nominees as aforesaid within three months from the time when any appointment is to be made, the Mayor shall appoint without such nomination.

Sec. 635. *Officers.* The commission shall serve without compensation as such, and shall elect a president, vice-president and secretary from its own members, whose terms of office shall be for one year and until their successors are elected and have qualified. The commission shall have power to adopt its own rules of procedure. Five commissioners shall constitute a quorum.

SEC. 636. *Offices to be provided; expenses, how met.* Suitable offices shall be provided for the commission by the board of estimate and apportionment. The expenses of the commission shall be paid by the city; and the amount of the same shall be fixed annually by the board of estimate and apportionment and the board of aldermen.

SEC. 637. *All works of art to be submitted to and approved by the commission.* Hereafter no work of art shall become the property of the city of New York, by purchase, gift or otherwise, unless such work of art or a design of the same, together with the proposed location of such work of art, shall first have been submitted to and approved by the commission; nor shall such work of art until so approved be contracted for, erected or placed in or upon, or allowed to extend over or upon any street, avenue, square, common, park, public building, or other public place belonging to the city. The commission may, when they deem proper, also require a complete model of the proposed work of art to be submitted. The term "work of art" as used in this title shall apply to and include all paintings, mural decorations, stained glass, statues, bas reliefs or other sculptures; monuments, fountains, arches, or other structures of a permanent character intended for ornament or commemoration. No existing work of art in the possession of the city shall be removed, relocated or altered in any way without the similar approval of the commission, except as provided in section six hundred and thirty-nine of this act. The commission shall act in a similar capacity, with similar powers, in respect of the designs of buildings, bridges, approaches, gates, fences, lamps or other structures erected or to be erected upon land belonging to the city, and in respect to the lines, grades and plotting of public ways and grounds and in respect of arches, bridges, structures and approaches which are the property of any corporation or private individual, and which shall extend over or upon any street, avenue, highway, park or public place belonging to the city, and said commission shall so act and its approval shall be required for every such structure which shall hereafter be erected or contracted for; except that in case of any such structure which shall hereafter be erected or contracted for at a total expense not exceeding two hundred and fifty thousand dollars, the approval of said commission shall not be required, if the mayor or the board of aldermen shall request said commission not to act. But this section shall not be construed as intended to impair the power of the park board to refuse its consent to the erection or acceptance of public monuments or memorials or other works of any sort within any park, square or public place in the city.

SEC. 638. *Time for decision limited.* If the commission shall fail to decide upon any matter submitted to it within sixty days after such submission, its decision shall be deemed unnecessary.

SEC. 639. *Removal or relocation of works of art; duty of commission.* In case the immediate removal or relocation of any existing work of art shall be deemed necessary by the mayor, the commission shall within forty-eight hours after notice from him approve or disapprove of such removal or relocation, and in case of their failure so to act within forty-eight hours after the receipt of such notice, they shall be deemed to have approved of the same.

No. 5. PLANNING PROVISIONS OF THE CHARTER AND ORDINANCE OF CLEVELAND, OHIO

CHARTER OF THE CITY OF CLEVELAND

SEC. 77. There shall be a city plan commission to be appointed by the mayor with power to control, in the manner provided by ordinance, the design and location of works of art which are, or may become, the property of the city; the plan, design and location of public buildings, harbors, bridges, viaducts, street fixtures and other structures and appurtenances; the removal, relocation and alteration of any such works belonging to the city; the location, extension and platting of streets, parks and other public places, and of new areas; and the preparation of plans for the future physical development and improvement of the city.

Ordinance of City of Cleveland

SEC. 4. Hereafter no public building, harbor, bridge, viaduct, street fixture, or other structure or appurtenance shall be located, constructed, erected, renewed, relocated, or altered until and unless such plan, design or location shall have been submitted to and approved by the commission; and no such work when completed shall be accepted by the city until and unless it shall have been approved by the commission as provided in sec. 77 of the City Charter.

No. 6. THE PENNSYLVANIA GENERAL PLAN ACT[61]

SEC. 9. Every municipal corporation shall have power to open, widen, straighten, or extend streets or alleys, or parts thereof, within its limits, and to vacate streets or alleys, or parts thereof. . . . The widening or straightening ordinances shall fix the new line or lines, and may require that thereafter no owner or builder shall erect any new building or rebuild or alter the front of any building already erected without making it conform to the new lines, in which

Power to open, etc., streets.

Buildings must be built within new lines.

[61] 1891, May 16; P. L. 75, as amended by 1913, July 22, P. L. 902, and 1921, May 17, P. L. 844. See also 1871, June 6, P. L. 1353, which affects only Philadelphia.

When right of action accrues to abutting owner.

case the landowner's right of action shall accrue only when the said municipal corporation actually enters on and occupies the land within the said lines, or the said building is located or relocated to conform to said lines. . . .

Plan of streets, etc.

Sec. 12. Every municipality shall have a general plan of its streets and alleys, parks and playgrounds, including those which have been or may be laid out, but not opened; which plan shall be filed in the office of the engineer or other proper office of the municipality, and all subdivisions of property thereafter made shall conform thereto. The location of streets or alleys, or parts thereof, or parks or playgrounds, laid out and confirmed by authority of councils, shall not afterwards be altered without the consent of councils; and no map or plot of streets or alleys or parks or playgrounds, shall be entered or recorded in any public office of the county in which said municipality is situated until approved by councils. No person shall hereafter be entitled to recover any damages for the taking for public use of any buildings or improvements of any kind which may be placed or constructed upon or within the lines of any located street or alley, or park or playground, after the same shall have been located or ordained by councils.

Effect.

No. 7. Planning Provision of Pennsylvania State Highway Act[62]

Change of width and lines.

Sec. 8. The State Highway Commissioner shall also have power, with the approval of the Governor, to establish the width and lines of any State Highway before or after the construction, reconstruction, or improvement of the same, not, however, exceeding the maximum width fixed by law for public roads. Whenever the State Highway Commissioner shall establish the width and lines of any such State Highway, he shall cause a description and plan thereof to be made, showing the center line of said highway and the established width thereof, and shall attach thereto his acknowledgment. Thereupon such description, plan, and acknowledgment shall be recorded in the office of the recorder of deeds of the proper county, in a separate book kept for such purpose, which shall be furnished to the recorder of deeds by the county commissioners at the expense of the county.

Plan of change.

Recordation.

Erection of improvements within new lines.

No owner or occupier of lands, buildings, or improvements shall erect any building or make any improvements within the limits of any State Highway the width and lines of which have been established and recorded as provided in this section, and, if any such erection or improvement shall be made, no allowance shall be had therefor by the assessment of damages.

Damages.

[62] Penn. Laws 1921, April 6, P. L. 107, amending 1911, May 31, P. L. 468.

No. 8.[63] The Pennsylvania Planning Act for Third Class Cities; the Provision for Approval of Plans

Sec. 5. All plans, plots, or re-plots of lands laid out in building lots, and the streets, alleys, or other portions of the same intended to be dedicated to public use, or for the use of purchasers or owners of lots fronting thereon or adjacent thereto, and located within the city limits of a city of the third class, or for a distance of three miles outside thereof, shall be submitted to the City Planning Commission and approved by it before it shall be recorded. And it shall be unlawful to receive or record such plan in any public office unless the same shall bear thereon, by endorsement or otherwise, the approval of the City Planning Commission. The disapproval of any such plans by the City Planning Commission shall be deemed a refusal of the proposed dedication shown thereon. The approval of the commission shall be deemed an acceptance of the proposed dedication; but shall not impose any duty upon the city concerning the maintenance or improvement of any such dedicated parts, until the proper authorities of the city shall have made actual appropriation of the same by entry, use, or improvement. No sewer, water, or gas-main, or pipes, or other improvement, shall be voted or made within the area under the jurisdiction of said commission, for the use of any such purchasers or owners; nor shall any permit for connection with or other use of any such improvement existing, or for any other reason made, be given to any such purchasers or owners until such plan is so approved. Where the jurisdictional limit of three miles outside of the city limits, as provided in this section, may conflict with the zone of similar character connected with another city of the third class, the jurisdiction of said commission shall extend only to the point equidistant between the city limits and the limits of said municipality.

Plans, plots, etc.

Dedication.

Recording.

Disapproval.

Approval.

Sewers, water, or gas-main.

Jurisdictional limit.

No. 9. The Proposed Massachusetts Metropolitan Planning Act

In 1911, Massachusetts (Acts and Resolves, ch. 84) caused an investigation to be made as to the desirability of appointing a planning commission for the Metropolitan District of Boston and its vicinity, a report of which was made to the legislature of the state in 1912 (House Report No. 1615). That report recommended the

[63] 1913, July 16; P. L. 752, being Pa. St. 1920, sec. 4383. Similar laws in other states are supplemented in a few cases by statutes requiring the record of plats. A similar act 1911, June 10, P. L. 872, was amended in 1921, May 17, P. L. 841, by inserting at the beginning of the section, immediately after sec. 5 the words "all plans of streets for public use, and."

appointment of such a commission and transmitted with its report a draft of an act (never passed) for that purpose, which is as follows:

SEC. 1. The governor, by and with the consent of the council, shall appoint three persons, and the mayor of Boston shall appoint two persons, who shall constitute a board to be known as the Metropolitan Planning Board. The members of said board shall hold office for terms of five years each beginning with the first Monday in May in the year nineteen hundred and twelve. Upon the expiration of the terms of the members so first appointed the governor shall appoint three members, one to serve for five years, one for three years and one for one year, and the mayor shall appoint two members, one to serve for four years and one for two years. Thereafter the respective appointments by the governor and mayor shall be for terms of five years. The governor shall appoint the chairman of the said board.

SEC. 2. The jurisdiction and powers of said board shall extend to and may be exercised in the cities of Boston, Cambridge, Chelsea, Everett, Lynn, Malden, Medford, Melrose, Newton, Quincy, Somerville, Waltham, and Woburn, and in the towns of Arlington, Belmont, Braintree, Brookline, Canton, Cohasset, Dedham, Dover, Hingham, Hull, Milton, Nahant, Needham, Revere, Saugus, Stoneham, Swampscott, Wakefield, Watertown, Wellesley, Weston, Westwood, Weymouth, Winchester, and Winthrop, and the said cities and towns together with any others that may be included by subsequent legislation shall constitute the metropolitan district within the meaning of this act.

SEC. 3. Except as hereinafter expressly provided nothing in this act shall be construed as affecting the powers now vested by law in any public authority.

SEC. 4. Duties and powers of the said board:

A. It shall be the duty of the said board to make or obtain surveys of the metropolitan district as herein defined, and for the purpose of making such surveys it shall have the right to do all reasonable and necessary acts.

B. It shall be the duty of the said board to make a comprehensive plan or series of plans for the present and probable future requirements of the metropolitan district in respect to a system of traffic thoroughfares and other main highways, transportation facilities of every sort suitably coördinated, sites for public buildings, parks, playgrounds and other public uses, and any and all public improvements tending to the advantage of the metropolitan district as a place of business and of residence.

C. It shall be the duty of the said board to study and, in its discretion, it may recommend such legislation applicable to the metropolitan district as will facilitate the prevention and relief of congestion of population and of traffic, the better control of fire hazard, the better distribution of areas and of buildings for the purposes of resi-

dence, manufacturing, trade and transportation, the preservation of the natural and historic features of the district, the beautifying thereof, the coördination of transportation facilities, the best method of financing and assessing the cost of public improvements or any other matter relating to a coördinated civic development within the said metropolitan district.

D. It shall be the duty of the said board to examine and make public reports upon all plans directly affecting the metropolitan district or more than one city or town therein made under authority of law, and for the purpose of such examination it shall be the duty of any existing public authority before making any contract or agreement for the execution of plans of the character aforesaid for any public improvements within the metropolitan district to inform the Metropolitan Planning Board as to such plans and give the said board reasonable opportunity for examining the same. The said reports may specifically approve or disapprove of said plans in whole or in part as the said board may by its examination determine, and shall state the reasons for such approval or disapproval. Wherever it is possible and desirable to effect a coördination of the plans for improvements within the said metropolitan district of two or more agencies, whether now existing or hereafter created and with local or general jurisdiction, it shall be the duty of the said board to seek to effect such a coördination.

E. If in the opinion of the said board any plan for a public improvement proposed for execution by the legally constituted authority in any county, city or town within the district conflicts with some existing or proposed public improvement of metropolitan character the board shall so inform the executive of the said county, city or town, whereupon the said county, city or town may abandon the proposed improvement, or shall execute the same in accordance with the plan of the said Metropolitan Planning Board, or shall postpone action upon the question of execution for not less than one year, after which such lawful action may be taken as the said county, city or town through its legally constituted authority may deem expedient.

F. The said board shall have the power when so requested by the authorities of any county, city or town within the said metropolitan district to furnish assistance for the making of plans or specifications or the supervision of the execution of public works at the cost of such assistance or supervision.

G. The board may place the question of the execution of any given metropolitan improvement within the limits of the metropolitan district before the government of each political unit in which such improvement is physically situated, and before any succeeding government in its discretion. It shall present estimates of cost with any plans for improvements whenever the question of execution is placed before public authorities. Every proposed improvement or any part

thereof when accepted by the government of the municipal unit in which it is situated, or by any other constituted authority having power to make such improvement, or part thereof, shall be executed by such government or authority whether now existing or hereafter created.

Sec. 5. The approval by the board of any plan or plans accepted by municipal authorities or boards of county commissioners or submitted to said Metropolitan Planning Board as hereinbefore provided, may in set terms designate and classify the improvements therein shown or any portion of them as ordinary or extraordinary metropolitan improvements. The cost of ordinary metropolitan improvements executed under the provisions of this act shall be paid as follows: sixty-five per cent by the municipality or municipalities in which the improvement is physically situated; twenty-five per cent by the remaining cities and towns constituting the said district in proportions determined by the commission appointed by the supreme judicial court as hereinafter provided and ten per cent by the commonwealth. The cost of extraordinary metropolitan improvements executed under the provisions of this act shall be paid as follows: such proportion thereof, not exceeding sixty-five per cent, as may be determined by the said commission appointed by the supreme judicial court as aforesaid, by the municipality or municipalities in which the improvement is physically situated; such amount, not less than twenty-five per cent thereof, as may be determined by the aforesaid commission by the remaining cities and towns constituting the said district, in proportions determined as aforesaid and ten per cent by the commonwealth.

Sec. 6. To meet the cost of the improvements executed in accordance with the provisions of this act, the treasurer and receiver general shall upon application of the Metropolitan Planning Board, issue scrip or certificates of debt in the name and on behalf of the commonweath and under its seal to the amount annually necessary for five years from the date of the first of such applications. In no one year shall the proportion to be paid by the commonwealth as its part in the expenses authorized by section five of this act exceed five hundred thousand dollars and the amount of scrip or certificates of debt issued in any one year as aforesaid shall be limited accordingly. All loans issued by the commonwealth in accordance herewith shall be serial loans and shall be made payable in annual instalments in the manner authorized by section thirteen of chapter twenty-seven of the Revised Laws as amended by section one of chapter three hundred and forty-one of the acts of the year nineteen hundred and eight. Such scrip or certificates of debt shall be designated on the face as the Metropolitan Planning Board Loan, shall be countersigned by the governor, and shall be deemed a pledge of the faith and credit of the commonwealth, and the principal and interest

shall be paid at the times specified therein in gold coin of the United States; and said scrip or certificates of debt shall be sold and disposed of at public auction or in such other mode and at such times and prices, and in such amounts and at such rates of interest as the governor and council shall deem best. Any premium realized on the sale of said scrip or certificates of debt shall be applied to the payment of the interest on said loan as it accrues.

SEC. 7. The supreme judicial court sitting in equity shall in the year nineteen hundred and twelve and every year thereafter on the application of the Metropolitan Planning Board, or of the attorney of any of the cities or towns in the metropolitan district, and after notice to each of said cities and towns, appoint three commisisoners, neither of whom shall be a resident of any of said cities or towns, who shall, after such notice and hearing as they shall deem just and equitable, determine the proportions in which each of said cities and towns shall pay money into the treasury of the commonwealth for the year following that in which the application is made to meet the interest, serial loan requirements, expenses, including the expenses of administration, and cost for such year. Said commission shall make such apportionment on or before the first day of March in each year. The said commissioners shall determine the several amounts to be paid by the cities and towns of the metropolitan district other than those in which ordinary or extraordinary improvements are situated to the aggregate amount of twenty-five per cent of the total cost of improvements classified as ordinary. In the case of improvements classified as extraordinary, they shall also determine how far, if at all, the proportion of the total cost of such improvements to be paid by the municipalities in which they are physically situated shall be reduced below sixty-five per cent and correspondingly increased as regards some or all of the remaining municipalities comprising the metropolitan district. The proportion to be ultimately payable by the commonwealth shall be ten per cent of the total cost whether for ordinary or extraordinary improvements. The amounts severally to be paid by the separate municipalities shall be apportioned by the said commissioners on the basis of benefit in each case and with due account of population, valuation and any other thing which, in the opinion of the said commission, should affect the said proportional contributions: *provided, however,* that nothing herein shall be construed to change the apportionment of the cost for public improvements to which the commonwealth already contributes under existing laws.[64]

SEC. 8. Said board may appoint such office and technical as-

[64] A study of the apportionment of assessments according to benefits, between the city as a whole, the various boroughs of the city, and the land owners in New York City, will reveal some analogy between it and the apportionment here suggested. See Charter, secs. 972-973.

sistants as it seems necessary to carry out the purposes of this act. It shall determine the duties and compensations of such appointees and remove them at pleasure. It shall be supplied with a suitable office or offices for its work and for its maps, plans, documents and records. The chairman of the said board shall receive a salary of ten thousand dollars a year and each of the other four members thereof shall receive a salary of one thousand dollars a year. The salaries of the commissioners and their appointees and the expenses of administration shall be paid from the treasury of the commonwealth and shall be thereafter assessed ninety per cent thereof upon the cities and towns of the metropolitan district as herein defined in proportions to be determined by a commission appointed by the supreme judicial court sitting in equity as hereinbefore provided and ten per cent by the commonwealth. On or before the second Wednesday of January in each year said board shall make a report in print of its proceedings to the general court, together with a full statement of its receipts and disbursements, and the said board may make such additional reports in print or otherwise from time to time as it may deem expedient.

Sec. 9. The treasurer of the commonwealth shall in the year nineteen hundred and twelve and in each year thereafter estimate, in accordance with the proportions determined and returned as aforesaid, the several amounts required during the year beginning with the first day of January from the cities and towns aforesaid, to meet said interest, serial loan requirements, salaries, expenses, including expenses of administration and cost for each year, and deficiency, if any, and shall include the amount required from a city or town in, and make it a part of, the sum to be paid by such city or town as its annual state tax and the same shall be paid by the city or town into the treasury of the commonwealth at the time required for the payment, and as a part of its state tax.

Sec. 10. This act shall take effect upon its passage so far as it affects the appointment of the members of the Metropolitan Planning Board and in all other respects this act shall take effect on the first day of nineteen hundred and twelve.

No. 10. The Pennsylvania Suburban Metropolitan Planning Act[65]

Whereas, The establishment of Suburban Metropolitan Planning Commissions having jurisdiction over territory adjacent to cities of the first class is desirable, in order to provide for its proper development by the coöperation of the various local governmental units in matters pertaining to their common welfare; and

[65] 1913, May 23; P. L. 339; repealed by 1915, June 1; P. L. 705.

WHEREAS, It is desirable, that there should be coördination of effort, with Urban Metropolitan Planning Commissions, relating to cities of the first class themselves, wherever the same may exist:—

Cities of the first class.

SEC. 1. Be it enacted, etc., That in order to secure coördinated, comprehensive plans of highways and roads, parks and parkways, and all other means of inter-communication, water-supply, sewerage and sewage disposal, collection and disposal of garbage, housing, sanitation and health playgrounds, civic centers, and other public improvements, as hereinafter provided for, the districts surrounding and within twenty-five miles of the limits of cities of the first class, whether in one or more counties, and in order to prevent waste by unnecessary duplication, the areas included within twenty-five miles of the limits of cities of the first class shall be denominated the Suburban Metropolitan Districts of cities of the first class of Pennsylvania. When any city, borough or township is partly within and partly without the twenty-five mile limit, the whole of such city, borough, or township shall be regarded as within the Suburban Metropolitan District.

Suburban Metropolitan districts.

SEC. 2. There shall be an executive department created for every Suburban Metropolitan District, to be known as the Department of Suburban Metropolitan Planning, which shall be in charge of a Suburban Metropolitan Planning Commission.

Suburban Metropolitan planning commission.

SEC. 3. The Suburban Metropolitan Planning Commission shall be appointed by the Governor of the State of Pennsylvania, and shall consist of fifteen members, who may or may not hold other public office, whether for profit or otherwise, of whom twelve shall be residents of the district involved, and three shall be residents of the said city of the first class, five members to be appointed to serve for one year, five for two years, five for three years; then, thereafter, each appointment to be for three years.

Appointment of commission.

Term of office

An appointment to fill a casual vacancy shall be for the unexpired portion of the term. Nine shall constitute a quorum.

Vacancies.

The Suburban Metropolitan Planning Commission shall make and alter rules and regulations for its own organization and procedure, consistent with the laws of the Commonwealth. From its own members it shall choose a chairman and vice-chairman. Each member shall serve without compensation. On or before January tenth of each and every year, the Commission shall make to the mayor of each city, to councils of each borough, to the commissioners of each first class township, and to the supervisors of each second class township, within the Suburban Metropolitan District, to the mayor of the said city of the first class, and to the Governor of the State of Pennsylvania, a report of its transactions and recommendations. The Commission may employ a secretary, engineers, and other experts and persons, whose salaries and wages, as well as all

Rules and Regulations.

Reports.

Assistants and employees.

the other necessary expenses of the Commission and members thereof, shall be provided for as hereinafter set forth.

SEC. 4. The Suburban Metropolitan Planning Commission shall make, or cause to be made, and laid before the respective governmental authorities of the district, and, in its discretion, cause to be published, a map or maps of the entire district, or any portion or portions thereof, showing any or all systems of transportation, highways and roads, parks, parkways, water-supply, sewerage and sewage disposal, collection and disposal of garbage, housing, sanitation, playgrounds and civic centers, or of other natural physical features of the district: and it shall prepare plans for any new or enlarged facilities for intercommunication, parks, parkways, water-supply systems, sewers, sewage disposal, garbage disposal, land plottings and housing arrangements, playgrounds and civic centers, or any other public improvement that will affect the character of the district as a whole, or more than one political unit within the district, or any widening, extension or relocation of the same, or any change in the existing township or borough or city plans, by it deemed advisable. And it shall make recommendations to the respective governmental authorities, from time to time, concerning any such matters or things aforesaid, for action by the respective legislative, administrative, or governmental bodies thereon; and in so doing have regard for the present conditions and future needs and growth of the district, and the distribution and relative location of all the principal and other streets, and railways, waterways, and all other means of public travel and business communications, as well as the distribution and relative location of all public buildings, public grounds, and open spaces devoted to public use, and the planning, subdivision and laying out for urban uses of private grounds brought into the market from time to time.

Maps.

Plans.

Recommendations.

SEC. 5. Any city, borough, or township, within any Suburban Metropolitan District, may request the Suburban Metropolitan Planning Commission of that district to prepare plans concerning any of the subjects set forth in section four of this act; whereupon it shall be the duty of the Commission to prepare such plans with dispatch.

Requests for plans.

SEC. 6. The Suburban Metropolitan Planning Commission may make recommendations to any public authorities, or any corporation or individual in said districts, with reference to the location of any buildings and structures to be constructed by them.

Buildings and Structures.

SEC. 7. The plans so made and laid before the respective governmental authorities by the Suburban Metropolitan District Planning Commission, according to sections four, five and six, shall be considered by such respective authorities, and followed by them in so far as shall be determined by each authority:

Proviso. Provided, however, that the provisions of this act shall not abridge or in any way affect the provisions of an act, entitled "An act cre-

ating a Department of Health and defining its powers and duties," approved the twenty-seventh day of April, Anno Domini, one thousand nine hundred and five; or the provisions of an act, entitled "An act to preserve the purity of the waters of the State for the protection of the public health," approved the twenty-second day of April, one thousand nine hundred and five.

Estimate of expenses.

SEC. 8. On or before January tenth of each and every year, the Commission shall prepare an estimate of its expenses for the ensuing year, setting forth with as much detail as is practicable the items of which such estimate is composed; and shall cause the amount of its expenses so estimated, after deducting the cash on hand and the unpaid assessments, to be assessed against the cities, boroughs, and townships within the district, in proportion to their respective tax duplicates. The itemized estimate of expenses and a statement of the rate of assessment shall be spread upon the minutes of the Commission, which shall be kept open at all times for public inspection. Each and every assessment, when certified by the chairman and secretary of the Commission, shall constitute a charge on the treasury of the respective city, borough, and township, and its immediate payment shall be at once provided for. The Commission shall have power to secure payment of the assessments by suits of mandamus, or otherwise; provided, that the rate of assessment shall not exceed one-tenth of one mill.

Assessment.

Proviso.

No. 11. THE NEW YORK, NEW JERSEY COMPACT FOR PLANNING NEW YORK HARBOR[66]

An Act authorizing designated authorities in behalf of the state of New York to enter into an agreement or compact with designated authorities of the state of New Jersey for the creation of the "Port of New York District," the establishment of "The Port of New York Authority," and the defining of the powers and duties of such authority.

SEC. 1. * Commissioners named and authorized to enter into the following compact with the state of Jersey.

Preamble.

WHEREAS, In the year eighteen hundred and thirty-four the states of New York and New Jersey did enter into an agreement fixing and determining the rights and obligations of the two states in and

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* Summarized.

[66] New York Laws 1921, ch. 154; New Jersey Laws, P. L. 1921, p. 412, ch. 151, practically identical with it. See also the various reports of the commission appointed under New York 1917, ch. 426, and New Jersey P. L. 1917, p. 288, ch. 130; and also New York Laws 1921, ch. 203; and New Jersey Laws, P. L. 1921, p. 423, ch. 152. For the original compact, see Laws, New York, 1834, ch. 8; New Jersey P. L. 1834, p. 118; ratified by the United States, 4 U. S. Statutes at Large 708.

about the waters between the two states, especially in and about the bay of New York and the Hudson River; and

WHEREAS, Since that time the commerce of the port of New York has greatly developed and increased and the territory in and around the port has become commercially one center or district; and

WHEREAS, It is confidently believed that a better coördination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the states of New York and New Jersey; and

WHEREAS, The future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums of money, and the cordial coöperation of the states of New York and New Jersey in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans; and

WHEREAS, Such result can best be accomplished through the cooperation of the two states by and through a joint or common agency.

NOW, THEREFORE, The said states of New Jersey and New York do supplement and amend the existing agreement of eighteen hundred and thirty-four in the following respects:

Agreement of co-operation.

ART. I. They agree to and pledge, each to the other, faithful cooperation in the future planning and development of the port of New York, holding in high trust for the benefit of the nation the special blessings and natural advantages thereof.

Port of New York District created.

ART. II. To that end the two states do agree that there shall be created and they do hereby create a district to be known as the "Port of New York District" (for brevity hereinafter referred to as "The District") which shall embrace the territory bounded and described as follows: . . .

Boundaries of District.

The boundaries of said district may be changed from time to time by the action of the legislature of either state concurred in by the legislature of the other.

Port of New York authority created.

ART. III. There is hereby created "The Port of New York Authority" (for brevity hereinafter referred to as the "Port Authority"), which shall be a body corporate and politic, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislature of either state concurred in by the legislature of the other, or by act or acts of congress, as hereinafter provided.

Commissioners.

ART. IV. The port authority shall consist of six commissioners —three resident voters from the state of New York, two of whom shall be resident voters of the city of New York, and three resident voters from the state of New Jersey, two of whom shall be resident voters within the New Jersey portion of the district, the New York members to be chosen by the state of New York and the New

Jersey members by the state of New Jersey, in the manner and for the terms fixed and determined from time to time by the legislature of each state respectively, except as herein provided.

Each commissioner may be removed or suspended from office as provided by the law of the state for which he shall be appointed.

ART. V. The commissioners shall, for the purpose of doing business, constitute a board and may adopt suitable by-laws for its management.

Commissioners to constitute board; bylaws.

ART. VI. The port authority shall constitute a body, both corporate and politic, with full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within said district; and to make charges for the use thereof; and for any of such purposes to own, hold, lease and/or operate real or personal property, to borrow money and secure the same by bonds or by mortgages upon any property held or to be held by it. No property now or hereafter vested in or held by either state, or by any county, city, borough, village, township or other municipality, shall be taken by the port authority, without the authority or consent of such state, county, city, borough, village, township or other municipality, nor shall anything herein impair or invalidate in any way any bonded indebtedness of such state, county, city, borough, village, township or other municipality, nor impair the provisions of law regulating the payment into sinking funds of revenues derived from municipal property, or dedicating the revenues derived from any municipal property to a specific purpose.

Port authority to constitute corporate and politic body—powers relative to terminal or transportation facilities.

The powers granted in this article shall not be exercised by the port authority until the legislatures of both states shall have approved of a comprehensive plan for the development of the port as hereinafter provided.[67]

Powers, when to be exercised.

ART. VII. The port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other. Unless and until otherwise provided, it shall make an annual report to the legislature of both states, setting forth in detail the operations and transactions conducted by it pursuant to this agreement and any legislation thereunder. The port authority shall not pledge the credit of either state except by and with the authority of the legislature thereof.

Additional powers and duties.

Annual report. Pledging credit of states.

ART. VIII. Unless and until otherwise provided, all laws now or hereafter vesting jurisdiction or control in the public service commission, or the public utilities commission, or like body, within each state respectively, shall apply to railroads and to any transportation, terminal or other facility owned, operated, leased or constructed by the port authority, with the same force and effect as

Application of laws relative to public service commission, etc.

[67] This approval given, Laws, New York, 1922, ch. 43, New Jersey, 1922, ch. 9, and ratified by U. S. Congress, 1921 and 1922.

if such railroad or transportation, terminal or other facility were owned, leased, operated or constructed by a private corporation.

Powers of municipalitiesnot impaired.

ART. IX. Nothing contained in this agreement shall impair the powers of any municipality to develop or improve port and terminal facilities.

Adoption of plans for port-development by states.

ART. X. The legislatures of the two states, prior to the signing of this agreement, or thereafter as soon as may be practicable, will adopt a plan or plans for the comprehensive development of the port of New York.

Plans prepared by port authority.

ART. XI. The port authority shall from time to time make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved by the legislatures of the two states, they shall be binding upon both states with the same force and effect as if incorporated in this agreement.

Recommendations to legislatures and congress.

ART. XII. The port authority may from time to time make recommendations to the legislatures of the two states or to the congress of the United States, based upon study and analysis, for the better conduct of the commerce passing in and through the port of New York, the increase and improvement of transportation and terminal facilities therein, and the more economical and expeditious handling of such commerce.

Port authority may petition certain authorities.

ART. XIII. The port authority may petition any interstate commerce commission (or like body), public service commission, public utilities commission (or like body), or any other federal, municipal, state or local authority, administrative, judicial or legislative, having jurisdiction in the premises, after the adoption of the comprehensive plan as provided for in article ten, for the adoption and execution of any physical improvement, change in method, rate of transportation, system of handling freight, warehousing, docking, lightering or transfer of freight, which, in the opinion of the port authority, may be designed to improve or better the handling of commerce in and through said district, or improve terminal and transportation facilities therein. It may intervene in any proceeding affecting the commerce of the port.

May intervene in proceedings.

Chairman, employees, etc.

ART. XIV. The port authority shall elect from its number a chairman, vice-chairman, and may appoint such officers and employees as it may require for the performance of its duties, and shall fix and determine their qualifications and duties.

Appropriations for expenses.

ART. XV. Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority and approved by the governors of the two states, but each state obli-

gates itself hereunder only to the extent of one hundred thousand dollars in any one year.

Action, when binding.

ART. XVI. Unless and until otherwise determined by the action of the legislatures of the two states, no action of the port authority shall be binding unless taken at a meeting at which at least two members from each state are present and unless four votes are cast therefor, two from each state.

Veto.

Each state reserves the right hereafter to provide by law for the exercise of a veto power by the governor thereof over any action of any commissioner appointed therefrom.

Obligations for expenses.

ART. XVII. Unless and until otherwise determined by the action of the legislatures of the two states, the port authority shall not incur any obligations for salaries, office or other administrative expenses, within the provisions of article fifteen, prior to the making of appropriations adequate to meet the same.

Rules for improvement of navigation and commerce.

ART. XVIII. The port authority is hereby authorized to make suitable rules and regulations not inconsistent with the constitution of the United States or of either state, and subject to the exercise of the power of congress, for the improvement of the conduct of navigation and commerce, which, when concurred in or authorized by the legislatures of both states, shall be binding and effective upon all persons and corporations affected thereby.

Penalties.

ART. XIX. The two states shall provide penalties for violations of any order, rule or regulation of the port authority, and for the manner of enforcing the same.

Boundary lines and jurisdicton not to be changed.

ART. XX. The territorial or boundary lines established by the agreement of eighteen hundred and thirty-four, or the jurisdiction of the two states established thereby, shall not be changed except as herein specifically modified.

Withdrawal by either state from agreement.

ART. XXI. Either state may by its legislature withdraw from this agreement in the event that a plan for the comprehensive development of the port shall not have been adopted by both states on or prior to July first, nineteen hundred and twenty-three; and when such withdrawal shall have been communicated to the governor of the other state by the state so withdrawing, this agreement shall be thereby abrogated.

ART. XXII. Definitions.—The following words as herein used shall have the following meaning: "Transportation facility" shall include railroads, steam or electric, motor truck or other street or highway vehicles, tunnels, bridges, boats, ferries, car-floats, lighters, tugs, floating elevators, barges, scows or harbor craft of any kind, air craft suitable for harbor service, and every kind of transportation facility now in use or hereafter designed for use for the transportation or carriage of persons or property. "Terminal facility" shall include wharves, piers, slips, ferries, docks, dry docks, bulk-

heads, dock-walls, basins, car-floats, float-bridges, grain or other storage elevators, warehouses, cold storage, tracks, yards, sheds, switches, connections, overhead appliances, and every kind of terminal or storage facility now in use or hereafter designed for use for the handling, storage, loading or unloading of freight at steamship, railroad or freight terminals. "Railroads" shall include railways, extensions thereof, tunnels, subways, bridges, elevated structures, tracks, poles, wires, conduits, power houses, substations, lines for the transmission of power, car-barns, shops, yards, sidings, turnouts, switches, stations and approaches thereto, cars and motive equipment. "Facility" shall include all works, buildings, structures, appliances and appurtenances necessary and convenient for the proper construction, equipment, maintenance and operation of such facility or facilities or any one or more of them. "Real property" shall include land under water, as well as uplands, and all property either now commonly or legally defined as real property or which may hereafter be so defined. "Personal property" shall include choses in action and all other property now commonly or legally defined as personal property or which may hereafter be so defined. "To lease" shall include to rent or to hire. "Rule or regulation," until and unless otherwise determined by the legislatures of both states, shall mean any rule or regulation not inconsistent with the constitution of the United States or of either state, and, subject to the exercise of the power of congress, for the improvement of the conduct of navigation and commerce within the district, and shall include charges, rates, rentals or tolls fixed or established by the port authority; and until otherwise determined as aforesaid, shall not include matters relating to harbor or river pollution. Wherever action by the legislature of either state is herein referred to, it shall mean an act of the legislature duly adopted in accordance with the provisions of the constitution of the state.

Consent, approval or recommendation of municipality; how given. Wherever herein the consent, approval or recommendation of a "municipality" is required, the word "municipality" shall be taken to include any city or incorporated village within the port district, and in addition in the state of New Jersey any borough, town, township or any municipality governed by an improvement commission within the district. Such consent, approval or recommendation whenever required in the case of the city of New York shall be deemed to have been given or made whenever the board of estimate and apportionment of said city or any body hereafter succeeding to its duties shall by majority vote pass a resolution expressing such consent, approval or recommendation; and in the case of any municipality now or hereafter governed by a commission, whenever the commission thereof shall by majority vote pass such a resolution; and in all other cases whenever the body authorized to grant consent to

the use of the streets or highways of such municipality shall by a majority vote pass such a resolution.

. . . . . .

* Sec. 2. Agreement to be binding when duly executed.

* Sec. 3. Authority of governor to fill vacancies among commissioners.

* Sec. 4. Commissioners of two states authorized to apply to congress of the United States for ratification of compact, but, without it, the compact shall be binding to the extent provided therein.

Sec. 5. This act shall take effect immediately.

No. 12. The New Jersey County Planning Act[68]

Development of county.

Sec. 1601. Every board of chosen freeholders shall have power to prepare and adopt a plan for the betterment and the systematic development of the county, and shall have power and authority to employ experts and to pay for their services, and to pay such other expenses as may be necessary for the making of such plan.

County plan commission.

Sec. 1602. Every board of chosen freeholders may, by resolution, provide for the establishment of a commission consisting of not more than seven citizens of such county to act as a county plan commission. Such commission, if established, shall have all the power and authority conferred upon boards of chosen freeholders by this article, except that the said commission may expend only such sums as may be appropriated for such purpose by the board of chosen freeholders.

Municipal coöperation.

Sec. 1603. Every board of chosen freeholders adopting any such plan, or any county plan commission appointed hereunder, shall endeavor to cause all municipalities within the county, and adjoining it, to coöperate in the laying out of roads and boulevards and in the betterment and the systematic development of the county.

No. 13. The California Capital City Planning Law[69]

State capital planning commission created.

Sec. 1. There shall be a state capital planning commission composed of the governor, and state librarian, ex-officio members and three members to be appointed by the governor, at least one of whom shall be a recognized expert in the planning of cities and towns. Appointive members of this commission shall serve without pay and shall hold office in the first instance for terms respectively for two years, four years, and six years and until their successors have been appointed and qualified. Their successors shall serve for terms of six years each and appointment to fill a casual vacancy shall be only for

* Summarized.

[68] P. L. 1918, p. 567, ch. 185, art. XVI.

[69] 1915, p. 1514, ch. 757.

the unexpired portion of the term. Three shall be a quorum. They may make and alter rules and regulations for their own procedure consistent with the laws of the state. They shall consider all matters in city planning affecting the future needs of the state and the relation of the state plans to those of the capital city.

Powers and duties.

SEC. 2. They shall confer and advise with the city planning body of the capital city concerning all matters affecting the metropolitan district in and about the said capital city and for a distance within fifteen miles outside the corporate limits of the said city. They shall make recommendations to the governing bodies of all political units within this area and to the governor with regard to all matters of interest to the state in and concerning its capital city with reference to its system of roads, boulevards and thoroughfares, street railway systems, smoke prevention, parks, parkways and playgrounds, water supply, sewage and sewage disposal, collection and disposal of garbage, civic centers, or of other natural or artificial physical features of the district, and of location proposed by it for any new or enlarged thoroughfares, street railway system, union depot, parks, parkways, playgrounds, water supply systems, sewers, sewage disposal plant, garbage disposal plant and civic centers, or any other public improvement that will affect the character of the district as a whole, to political units within the district. It may make recommendations to the state, city or district governmental authorities, from time to time concerning any such matters or things aforesaid for action by the respective legislative, administrative or governing bodies thereof. In so doing they shall have regard for the present conditions and future needs and growth of the district, and the distribution and relative location of all the principal and other streets and railways, waterways, and all other means of public travel and business communication, as well as the distribution and relative location of all public buildings, public grounds and open spaces devoted to the public use, and the planning and laying out for urban uses of private grounds brought into the market from time to time.

SEC. 3. The state capital planning commission shall make an annual report to the governor which the secretary of state shall cause to be printed as a public document and copies of this report shall be filed with each and every governing body in the district under supervision.

Report.

No. 14. THE PENNSYLVANIA STATE PLANNING BUREAU ACT[70]

Secretary of Internal Affairs. Bureau of municipalities.

SEC. 1. The Secretary of Internal Affairs shall establish in the said Department of Internal Affairs a Bureau of Municipalities. The said Bureau shall gather, classify, index, make available, and dis-

[70] P. L. 1919, April 4, p. 45.

seminate data, statistical information, and advice that may be helpful in improving the methods of administration and municipal development in the several municipalities of the Commonwealth; and shall maintain, for the benefit of the municipalities, a publicity service to install or assist in the installation and establishment of modern systems of accounting in the various municipalities of the state, and in order to promote a comprehensive plan or series of plans for the probable future requirements of cities, boroughs, or townships of the Commonwealth, either separately or jointly, in respect to a system of traffic thoroughfares and other highways or main highways, transportation of every sort, suitably coördinated sites for public buildings, parks, parkways, playgrounds, and other public uses, the preservation of natural and historic features, and any and all public improvements tending to the advantage of municipalities or townships affected, tending to their advantage as a place of business and residence, and to either make or secure or assist in making or securing the necessary surveys, plans, and information.

Duties.

Publicity service.

SEC. 2. The Secretary of Internal Affairs is hereby authorized to employ a Chief of Bureau of Municipalities, who in his judgment shall be qualified to perform the duties herein described. He is also authorized to employ such engineering, accounting, clerical, stenographic, and other expert service, relating to the gathering of information, its distribution and publication and other duties incident to the purpose of the Bureau, or transfer to such duties in this Bureau as he may find advisable the work and services of other bureaus or of others employed in the department. The salaries of the employees appointed under the provisions of this act shall be fixed by the Secretary of Internal Affairs, and shall be paid from the funds appropriated to the said Department of Internal Affairs.

Employees.

Salaries.

SEC. 3. It is hereby made the duty of every city, borough, township, or county official, to furnish such information as may be requested by the Chief of the Bureau of Municipalities or his duly authorized deputy.

Duty of municipalities.

* Secs. 4 and 5. Repeals and time when law goes into effect.

* Summarized.

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- *D.* increment taxation

VI. Planning for the Promotion of Beauty
- *A.* legal means and accomplishment
- *B.* regulating outdoor advertising

VII. Planning Administration

Australia; Belgium; Canada; France; Germany (General; Metropolitan); Great Britain (General; Metropolitan); Greece; India; Italy; Scotland; Sweden; United States (General; Planning Commissions; Cities; Metropolitan)

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TABLES OF STATUTES

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INTRODUCTORY NOTE

In the following tables will be found references to the principal statutes in the various political subdivisions of this country, with relation to a few of the main divisions of city planning law. Except as otherwise noted, the references are to the session laws in these jurisdictions and the statutes apply to a number of local governmental units and not exclusively to one such unit.

When the text of the statute is given in this work, the reference to the page where it will be found is given in bold-face type. In a few cases in which amendatory statutes have appeared after the text of the book was in print, the substance of the amendment has been stated here in *italics.*

I. PLANNING THE CITY AS A WHOLE

A. APPROVAL OF PLATS A PREREQUISITE TO RECORD

Note: Except as otherwise specified, the statute applies only to land within the city. Where it applies to land outside, and within a certain distance of the exterior limit of the city, that distance is given. In a few cases the statute makes it unlawful to sell the land unless its requirements are fulfilled. These statutes are starred.

Arizona. 1921, ch. 27.
California. 1915, ch. 756, p. 1512; now General Laws, Act 2065, sec. 4.

CONNECTICUT. *Hartford.* 15 Special Laws, p. 661 (1909, no. 74).
GEORGIA. *Fulton County and City of Atlanta.* * 1921, p. 216 (approved August 10), and an identical act, * 1921, p. 219 (approved August 15), (6 miles outside Atlanta).
ILLINOIS. 1921, p. 260; being Smith's Revised Statutes, 1921, ch. 24, sec. 72 (1½ miles); *Counties,* 1921, p. 385; being ditto, ch. 34, sec. 25.
INDIANA. 1921, p. 561 (5 miles); being Burns, 1921, Suppt., sec. 8657l.
KANSAS. 1921, chs. 99, 139.
LOUISIANA. Constitution and Statutes, 1920, II, 1269, being Act 160 of 1918, p. 271 (sec. 125), (3 miles).
MASSACHUSETTS. General Laws, 1921, ch. 41, secs. 73–81.
MINNESOTA. 1919, ch. 292, p. 300.
MISSOURI. * 1921, p. 509 (approved March 30).
NEBRASKA. 1917, ch. 87 (3 miles).
NEW JERSEY. P. L. 1912, p. 436, amended 1913, p. 119, now Comp. Stat. 1st Suppt. (1911–15), p. 413, secs. 25–27.
NEW YORK. 1913, ch. 699, adding art. 12-A to the General Municipal Law (p. **584**); *New York City,* 1916, ch. 513, amending charter, sec. 1540; *Rochester,* 1921, ch. 524; *Syracuse,* 1913, ch. 370 (3 miles).
OHIO. General Code, 1910, sec. 4346 (3 miles).
OREGON. 1919, ch. 311.
PENNSYLVANIA. 1911, June 10; P. L. 872; being Pa. St. 1920 (Penn. Statutes complete to 1920, West Publishing Co.), secs. 3723-3727; amended 1921, May 17; P. L. 841. 1913, July 16; P. L. 752, sec. 3, being Pa. Sta. 1920, sec. 4381 (3 miles).
VIRGINIA. 1918, ch. 419 (15 miles).
WISCONSIN. 1909, ch. 162, amended 1917, ch. 404; now Statutes, 1921, sec. 62, 23 subd. (2) (1½ miles).

B. CITY PLAN

Laws for the appointment of Planning Commissions (for which see Table V—*A*) usually authorize the preparation and in some cases the adoption of a plan, as do also the following statutes.

CONNECTICUT. Revised Statutes, 1918, secs. 388, 390; 1921, ch. 30.
MARYLAND. *Baltimore.* See "Code of Public Local Laws of Maryland," secs. 84–86, art. 4, title, "City of Baltimore," sub-title, "Charter."
MICHIGAN. 1921, no. 348, amended 1921, 2d Extra Session, no. 5.
NEW YORK. *New York City,* Charter (4th ed. 1918, Ash), ch. X, title 4 (secs. 438–449); *Buffalo,* Charter, sec. 365, added by Laws, 1922, ch. 411.
PENNSYLVANIA. 1891, May 16; P. L. 75; sec. 12 amended 1913, July 22; P. L. 902 to be found in Pa. St. 1920, sec. 19476; sec. 9 amended 1921, May 17; P. L. 844 (p. **587**); repealed with relation to *boroughs* by sec. 1 of art. 1 of ch. XIII of Act of 1915, May 14; P. L. 312. *Townships, first-class,* see Pa. St. 1920, sec. 7072. *Boroughs,* ib. sec. 1861–1866. *State highways,* 1921, Apr. 6; P. L. 107 (p. **588**). *Philadelphia,* see Pa. St. 1920, secs. 19417–19418. See also a modification of the law with relation to parks and parkways in the *cities of the first class* (*Philadelphia*), 1915, June 7; P. L. 894, being Pa. St. 1920, secs. 3187-3189, which however is generally regarded as contrary to certain special provisions of the Constitution of Pennsylvania. See Opinions of City Solicitor of Philadelphia, p. 98, in Philadelphia Ordinances and City Solicitors Opinions, 1920. *See also* Shuster v. Philadelphia, 239 Pa. St. 468 (1913).

II. PLANNING THE PUBLIC FEATURES

A. EXCESS CONDEMNATION

CONNECTICUT. *Hartford,* 15 Private Acts, p. 43 (1907, no. 61); *New Haven,* 16 Private Acts, p. 897 (1913, no. 243).
HAWAII. *Counties.* 1919, ch. 170.
MARYLAND. *Baltimore,* 1904, ch. 87; 1908, ch. 166. Interpreted in Bond v. Mayor, etc., of Baltimore, 116 Md. 683 (1911).
MASSACHUSETTS. Constitution, art. X, pt. 1 (1911) (p. **148**); 1904, ch. 443, interpreted in Opinion of Justices, 204 Mass. 607, 616 (1910). *Salem,* 1912, ch. 635; *Special Acts under the Constitutional Amendment,* 1912, ch. 186 (p. **153**); 1913, chs. 201, 326, 703, 778, and others.
MICHIGAN. Joint resolution for amendment of Constitution, 1921, no. 1, to be submitted to the people for ratification, November, 1922.
NEBRASKA. 1915, ch. 213.
NEW JERSEY. *Newark,* P. L. 1870, p. 311, ch. 117 (p. **149**).
NEW YORK. *Constitution,* art. 1, sec. 7 (1913) (p. **149**); *New York City,* 1812, ch. 174, held unconstitutional in Matter of Albany St., 11 Wendell (N. Y.) 149 (1834); 1911, ch. 776, amended 1913, ch. 521; 1915, ch. 593, inadvertently repealed; reënacted in identical language, 1916, ch. 112, being charter secs. 970*a* and 970*b* (p. **153**); *Syracuse,* 1914, ch. 300, amended 1918, ch. 448; *Rochester,* 1920, ch. 431, amended 1921, ch. 524.
OHIO. *Constitution,* art. XVIII, sec. 10 (1912) (p. **148**); General Code, 1910, sec. 3677, par. 12 (1904) (p. **151**).
OREGON. 1913, ch. 269 (now Laws 1920, secs. 3837–3844) (p. **151**), does not apply to Portland, Branch v. Albee, 71 Oreg. 188 (1914).
PENNSYLVANIA. 1907, June 8; P. L. 466 held unconstitutional in Penn. Mut. Life Ins. Co. v. Philadelphia, 242 Pa. St. Reports 47 (1913).
RHODE ISLAND. *Constitution,* art. XVII (1916) (p. **149**); *Providence,* 1917, ch. 1560 (p. **159**); *Pawtucket,* 1919, ch. 1825.
SOUTH CAROLINA. 7 Statutes, 136 (1817) interpreted Dunn v. City Council of Charleston, 16 So. Car. Law Reports (sometimes cited as Harper's Law Reports) 189 (1824).
VIRGINIA. Code, 1919, sec. 3065 (1906, 1916) (p. **152**).
WISCONSIN. *Constitution,* art. XI, sec. 3-A (1912) (p. **148**); Statutes, 1921, sec. 27.11 (formerly 1911, ch. 486); ib. sec. 62.23 subd. (3) (formerly 1909, ch. 162, 165; 1919, ch 400).

B. SET BACKS

The statutes given below provide for set backs under the power of eminent domain. The subject of set backs under the police power is discussed on p. 279 of this work.

CALIFORNIA. 1917, ch. 735, p. 1421; now General Laws, Act 431*a*.
CONNECTICUT. General Statutes, 1918, secs. 392–395, 518–519. Many special acts will be found in the Private and Special Laws, Vol. I, and these laws for 1911, 1913, 1915 and 1917; also in the Charter of *Hartford,* sec. 7, amended 12 Special Laws, p. 948 (1897, no. 299). Of special interest is 16 Special Laws, p. 1161 (1913, no. 417), giving *New Haven* power to limit heights, with compensation, near parks. Similar laws will be found in other States.
DISTRICT OF COLUMBIA. U. S. Stats. at Large, Vol. 31, p. 248, ch. 299 May 31, 1900; Vol. 34, p. 384, ch. 3505 (June 21, 1906).

GEORGIA. 1921, p. 216 (Aug. 10), and an identical act, 1921, p. 219 (Aug. 15).
INDIANA. 1909, p. 210, sec. 7; 1911, p. 566, being Burns, 1914, sec. 8753 (p. **184**); 1917, p. 474, sec. 9, being Burns, 1921 Suppt., sec. 8746 h. 1920, July Spec., p. 105.
IOWA. 1919, ch. 145, being Code 1919, sec. 3615–3616; see also 1921, ch. 200.
MASSACHUSETTS. General Laws, 1921, ch. 82, sec. 37 (p. **184**); ch. 45, sec. 11 (height near parks); see ch. 41, sec. 80.
MINNESOTA, 1903, ch. 194, p. 290; amended 1919, ch. 504, p. 672; see Revised Laws, Supplement, 1909, sec. [765–] 149, subd. 8.
MISSOURI. *St. Louis,* Charter, art. VI, sec. 1; 1921, p. 510 (Mch. 30). *First-class cities,* Revised Statutes, 1919, sec. 7846.
NEW JERSEY. P. L. 1917, p. 765, ch. 215; amended, P. L. 1920, p. 276, ch. 137; P. L. 1922, p. 417, ch. 238.
NEW YORK. *New York City,* Charter, secs. 439, 442, 970, 976; amended 1917, ch. 631, 632 (p. **185**). *Villages,* 1921, ch. 464, adding subd. 30 to sec. 89 of the Village Law. *Towns, Westchester County,* 1922, ch. 322, adding subd. 18 to sec. 142*a* of the Town Law.
NORTH DAKOTA. 1907, ch. 179; amended 1909, ch. 176; 1911, ch. 75, being Compiled Laws, 1913, secs. 4055-4063.
OREGON. 1919, ch. 275.
PENNSYLVANIA. See references under City Plan (Table I—*B*); also ordinances of *City of Philadelphia* of March 31, 1884, June 23, 1888, June 30, 1892, and June 30, 1921; as well as the arcading ordinance of June 9, 1900.
SOUTH CAROLINA. *Spartanburg.* See 1921, no. 417.
TEXAS. *Cities over 5,000,* 1921, ch. 87.
VIRGINIA. Code 1919, sec. 3032.
WISCONSIN. *Cities,* 1907, ch. 619, being Statutes, 1921, sec. 62.23, sub. (11). *First, Second and Third Class Cities,* 1917, ch. 471, 560, being Statutes, 1921, sec. 62.23, subd. (10).

III. PLANNING THE PRIVATE FEATURES

A. ZONING

The Statutes in this list, except as otherwise noted, provide for zoning under the police power. The statutes which confer more or less zoning power upon city planning commissions are marked with a dagger (†).

CALIFORNIA. † 1917, Ch. 734, p. 1419; now General Laws, Act 431.
CONNECTICUT. *New Haven,* 18 Special Acts, p. 1045 (1921, no. 428).
DISTRICT OF COLUMBIA. U. S. Stats. at Large, Vol. 36, pt. 1, p. 452, ch. 263 (1910); ib., Vol. 41, pt. 1, p. 500, ch. 92 (March 1, 1920) (p. **301**).
GEORGIA. † *Atlanta,* 1921, p. 665.
ILLINOIS. 1921, p. 180, being Smith's Revised Statutes, 1921, ch. 24, secs. 66–70.
INDIANA. † 1921, p. 660; being Burns 1921 Suppt., secs. 8655*a*–8655*g*.
IOWA. *First Class and Commission Cities.* 1917, ch. 138; being Code, 1919, secs. 3617–3619; amended 1921, ch. 200.
KANSAS. *First Class Cities over 200,000.* † 1921, ch. 100.
LOUISIANA. *Cities, 50,000 and over.* Constitution and Statutes, 1920, p. 1355, being Act 27 of 1918.
MASSACHUSETTS. *Constitution,* art. LX (p. **293**); General Laws, 1921, ch. 40, secs. 25–30, amended, see amendments adopted Dec. 7, 1920, p. 7; ib., ch. 143, sec. 3; also 1922, ch. 40 (*amending provisions with regard*

to repeal or modification of zoning ordinance when person affected objects, so that City Councils of ten or more members may pass same by three-fourths vote). *Heights, Boston,* 1898, ch. 452; 1904, ch. 333; 1905, ch. 383; 1907, ch. 416; 1912, ch. 582; 1914, ch. 786; 1915, ch. 333; 1919, ch. 156. *Chelsea,* 1908, ch. 559.

MICHIGAN. † 1921, no. 207, and 1921, no. 348, amended by 1921, 2d Extra Session, no. 5 (Home Rule). *Detroit,* † Charter, ch. X.

MINNESOTA. *First Class Cities.* 1915, ch. 128, p. 180; amended 1919, ch. 297, p. 305 (eminent domain)[1]; † 1921, ch. 217, p. 267. *Cities, 50,000 or over.* 1913, ch. 98, p. 102, being Gen. Stats., 1913, sec. 1581; 1913, ch. 420, p. 618, being Gen. Stats. 1913, sec. 1582–1585.

MISSOURI. *Cities, 200,000–600,000.* † 1921, p. 177, and *Cities containing 50,000 or less.* 1921, p. 481.

NEBRASKA. *Metropolitan Cities.* † 1919, ch. 185.

NEW JERSEY. *Municipalities.* P. L. 1920, p. 455, ch. 240; P. L. 1921, p. 132, Ch. 82; P. L. 1922, p. 277, ch. 162; P. L. 1922, p. 406, ch. 234 (*authorizing zoning by stories*). See P. L. 1917, p. 318, ch. 152, being a codification of most of the municipal law of the state, but containing, when passed, no zoning provisions. *Cities.* P. L. 1920, p. 436, ch. 229. *First Class Cities.* † P. L. 1917, p. 94, ch. 54. *First and Second Class Cities.* † P. L. 1918, p. 338, ch. 146; † P. L. 1920, p. 436, ch. 229 (p. **298**). † 1920, p. 496, ch. 274; † P. L. 1922, p. 309, ch. 181. *Third and Fourth Class Cities.* † P. L. 1921, p. 816, ch. 276. *Boroughs.* † P. L. 1922, p. 691, ch. 279.

NEW YORK. 1917, ch. 483, being General City Law, sec. 20, subd. 24, 25, 26; 1920, ch. 743, being General City Law, art. 5-A (secs. 81–83) (p. **295**); 1921, ch. 464, being Village Law, sec. 89, subd. 30. *New York City,* 1914, ch. 470; amended 1916, ch. 497, and 1917, ch. 601, being Charter, secs. 242*a*, 242*b*, 718 and 719 (p. **293**). *Niagara Falls,* 1920, ch. 633; *Rochester,* 1917, chs. 483, 505; 1921, ch. 524.

OHIO. † 1919, 108 v. 1175, adding to Code secs. 4366–7 to 4366–12.

OREGON. † 1919, ch. 300, now Laws 1920, secs. 3873–3878.

PENNSYLVANIA. *Second Class Cities.* † 1919, June 21; P. L. 570, being Pa. St., secs. 3893–3896; 1921, May 11; P. L. 503. *Philadelphia,* 1915, May 11; P. L. 285; 1919, June 25; P. L. 581, sec. 9; being Pa. St. 1920, sec. 2984.

RHODE ISLAND. 1921, ch. 2069.

SOUTH CAROLINA. See 1921, ch. 417.

TENNESSEE, 1921, ch. 165.

TEXAS. *Cities over 5,000.* 1921, ch. 87.

VIRGINIA, 1922.

WISCONSIN. *Cities.* † 1917, ch. 404, being Statutes, 1921, sec. 62.23, subd. 5, 6. *Certain Villages.* 1917, ch. 507, being Statutes, 1921, sec. 61.35 (eminent domain).[1]

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[1] The following statutes, now repealed, provided for zoning by eminent domain: Nebraska, 1915, ch. 213, secs. 4–9; Wisconsin, 1913, ch. 456, 457.

IV. PLANNING FOR THE PROMOTION OF BEAUTY

A. OUTDOOR ADVERTISING

a. Taxation or Regulation

ALABAMA. 1919 (General), p. 403 (Schedule 18).
CONNECTICUT. 1919, ch. 245; General Statutes, 1918, secs. 3027–3030.
FLORIDA. Revised General Statutes, 1920, sec. 815.
HAWAII. Revised Laws, 1915, secs. 2057–2062.
ILLINOIS. Smith's Revised Statutes, 1921, ch. 24, sec. 668.
IOWA. Code Supplement, 1913, sec. 700*b*.
KANSAS. 1921, ch. 135.
MASSACHUSETTS. Constitution, article L; General Laws, 1921, ch. 93, sec. 29–33 (Rules and regulations thereunder, July 1, 1921).
MISSOURI. Revised Statutes, 1919, Vol. 2, sec. 7976, par. 33, 43.
NEBRASKA. Revised Statutes, 1913, secs. 4112, 4421, 4613, 4826 and 5034.
NEW JERSEY. Compiled Statutes, 1910, Vol. 1, pp. 654, 656, 659.
NEW YORK. Consolidated Laws, 1909. Village Law, sec. 90, subd. 26.
NORTH DAKOTA. Compiled Laws, 1913, secs. 3599, subd. 17; 3818, subd. 11; 3861, subd. 11.
OHIO. General Code, 1910, secs. 3616, 3637.
PORTO RICO. Compiled Statutes, 1911, secs. 1–9.
RHODE ISLAND. 1910, ch. 542.
TEXAS. Complete Statutes, 1920, sec. 1096*d* (p. 211).
VERMONT. 1921, no. 44.
WISCONSIN. Statutes, 1921, sec. 59.07, subd. 16.
PHILIPPINE ISLANDS. Administrative Code, 1917, secs. 1438, 1475–1477.

b. Prevention of Disfigurements

CALIFORNIA. 1911, p. 957; 1915, p. 642.
COLORADO. Mills' Annotated Statutes, 1912, secs. 2054–2058.
CONNECTICUT. General Statutes, 1918, secs. 6219, 6298.
DELAWARE. Revised Statutes, 1915, sec. 3487.
ILLINOIS. Smith's Revised Statutes, 1921, ch. 38, sec. 466, par. 9.
MAINE. Revised Statutes, 1916, ch. 129, sec. 18.
MARYLAND. Code Public General Laws, article 39-A, sec. 15-I.
MASSACHUSETTS. General Laws, 1921, ch. 266, sec. 126.
MONTANA. Revised Codes, 1921, sec. 11481.
NEW JERSEY. P. L. 1917, p. 290, ch. 131.
NEW YORK. Penal Law, sec. 1423, subd. 11.
PENNSYLVANIA. Pa. Statutes, 1920, sec. 7967–7969.
RHODE ISLAND. General Laws, 1909, ch. 241, sec. 5; ch. 345, sec. 41.
VERMONT. General Laws, 1917, secs. 328, 6941, 6948, 6949, 6951, 6971.

V. PLANNING ADMINISTRATION

A. PLAN COMMISSIONS

Under some statutes, Plan Commissions are also Art Commissions. These statutes in this table are starred. The commissions are City Commissions, unless otherwise noted.

There are numerous special laws, charter enactments, and home rule constitutional and statutory provisions, under which the adoption of plans

and the appointment of planning commissions are authorized, and in many cases have occurred, which are not mentioned in this table. Commissions merely with advisory powers usually may be and often have been appointed without express statutory authority.

In some statutes the Commission is given more or less express authority with regard to zoning. These statutes are marked with a dagger (†). In some zoning statutes such authority is given city planning commissions. These statutes will be found in the table of Zoning Statutes (Table III—*A*), marked with a dagger.

CALIFORNIA. † 1915, ch. 428, p. 708, now General Laws, Act 2389*j*. The statute applies only to *fifth and sixth class cities*. Many of the *cities of classes I to IV* have charter provisions authorizing the appointment of City Planning Commissions; and they all have the power to adopt home rule charters which shall include such a power. See also 1915, p. 1514 (*Capital City Planning Commission*), now General Laws, Act 3805 (p. **603**).

CONNECTICUT. Many cities and towns have provisions in their charters or are empowered by special statutes to appoint commissions; as, for instance, *Hartford,* 15 Special Laws, p. 43 (1907, no. 61), amended 15 Special Laws, p. 634 (1909, no. 34), sec. 6, and p. 661 (no. 74), where the first permanent official commission in this country was created; also *New Haven,* 16 Special Laws, p. 897 (1913, no. 243); *New London,* 16 ib., p. 1035 (1913, no. 351). Especially interesting are *Windsor,* 17 Special Laws, p. 827 (1917, no. 133), and *Bloomfield,* 17 Special Laws, p. 831 (1917, no. 134), with relation to which see p. 36, ff., of this work. Any town, city or borough in this state is now empowered to create such a commission. 1921, ch. 30. See also Revised Statutes, 1918, secs. 391–396.

ILLINOIS. † 1921, p. 260, being Smith's Revised Statutes, ch. 24, secs. 71–73.

INDIANA. *† 1921, p. 561, being Burns, 1921 Suppt., secs. 8657*e*–8657*p*.

KANSAS. *First Class Cities over 200,000.* 1921, ch. 99.

KENTUCKY. 1922.

MASSACHUSETTS. General Laws, 1921, ch. 41, secs. 70–72, 73–81; ch. 45, sec. 2.

MICHIGAN. 1921, no. 348, amended 1921, 2d extra session, no. 5.† *Detroit* *† Charter, ch. X (1919).

MINNESOTA. *† *Certain First Class Cities.* 1919, ch. 292, p. 300 (p. **576**). Under art. IV, sec. 36 of the Constitution, cities and villages are also given the right to frame and amend their own charters, and therefore to adopt plans and appoint planning commissions.

NEBRASKA. † 1915, ch. 213; amended 1919, ch. 185.

NEW JERSEY. *First Class Cities.* P. L. 1911, p. 103, ch. 71. * P. L. 1913, p. 112, ch. 72. *Second Class Cities.* * P. L. 1913, p. 281, ch. 170. *Third and Fourth Class Cities, Boroughs, etc.* * P. L. 1915, p. 350, ch. 188, amended P. L. 1916, p. 377, ch. 175; P. L. 1920, p. 414, ch. 216 (p. **578**); P. L. 1921, p. 695, ch. 218. *Counties.* P. L. 1918, p. 567, ch. 185, art. XVI (p. **603**). *Port Authorities.* P. L. 1921, pp. 412 (p. **597**), 423, chs. 151, 152; P. L. 1922, p. 25, ch. 9 (approved Feb. 25). The plan was approved by the U. S. Congress, Aug. 23, 1921. See also P. L. 1922, p. 191, ch. 104.

NEW YORK. 1913, ch. 699, being art. 12-A of the General Municipal Law, amended 1920, ch. 377; 1921, ch. 464 (p. **581**). *Syracuse,* 1920, ch. 447; amended by 1922, ch. 544. *Rochester,* 1917, ch. 505. *Westchester County,* 1915, ch. 109; *Towns in Westchester County,* 1922, ch. 322, adding subd. 18 to sec. 142*a,* Town Law. *Port Authority,* 1921, ch.

154 (p. **597**), 203; 1922, ch. 43. The plan was approved by the U. S. Congress, Aug. 23, 1921.

OHIO. * Laws, 106 v. 455 (1915), being Code * secs. 4366, 1–6; amended † 1919, 108 v. 1175, adding to Code, secs. 4366–7 to 4366–12. *Cleveland,* * Charter, sec. 77. Municipalities are also, by home rule provisions, authorized to frame their own charters, and thus obtain power to adopt maps, appoint planning commissions, etc.

OREGON. *Portland,* * 1919, ch. 311, now * Laws 1920, secs. 3862–3872.

PENNSYLVANIA. *First Class Cities.* 1919, June 25; P. L. 581, sec. 10, being Pa. St. 1920, sec. 2985. *Second Class Cities,* 1911, June 10; P. L. 872, being Pa. St. 1920, secs. 3723–3727, amended 1921, May 17; P. L. 841. *Third Class Cities,* 1913, July 16; P. L. 752, being Pa. St. 1920, secs. 4379–4384 (p. **589**). *Metropolitan District,* 1913, May 23; P. L. 339 (p. **594**) (repealed in 1915, abolishing the Commission).

SOUTH CAROLINA. *Spartansburg.* † 1921, no. 417.

VERMONT. 1921, no. 107.

WISCONSIN. * 1909, ch. 162, amended 1917, ch. 404, now Statutes, 1921, sec. 62.23, subd. (1)–(3).

B. ART COMMISSIONS

Except as otherwise noted, the commissions created by the laws given below are municipal commissions. To this list should be added the laws creating commissions with both planning and art regulation powers, for which see Table V—*A ante.*[1]

ALABAMA. *State and Local.* General Acts, 1919, p. 880 (no. 636).

ARKANSAS. *State,* Digest, 1921, ch. 21 (sec. 839).

CONNECTICUT. *State,* General Statutes, 1918, ch. 114, secs. 2186–2192. *New Haven,* 14 Special Laws, p. 728 (1905, no. 294).

DISTRICT OF COLUMBIA. See United States.

ILLINOIS. *State,* 1909, p. 96; now Smith's Revised Statutes, 1921, ch. 127, sec. 6, 50. *Municipal,* 1899, p. 89; amended 1915, p. 260; now Smith's Revised Statutes, 1921, ch. 24, sec. 622–629. *Chicago,* Code (Callaghan and Co., 1911), secs. 121–122.

MASSACHUSETTS. *State,* General Laws, 1921, ch. 6, secs. 19–20. *Cities and towns,* ib., ch. 41, secs. 82–84. *Boston,* 1898, ch. 410.

MINNESOTA. General Statutes, 1913, sec. 1611.

NEW YORK. *Cities of First and Second Class,* 1900, ch. 327, secs. 120, 122, being General City Law, former Art. 8, renumbered (1911, ch. 718) art. XI A (secs. 165–167). *New York City,* Charter, secs. 633–639 (p. **584**). *Mount Vernon,* 1909, ch. 552.

OHIO. General Code, 1910, secs. 4343–4345.

PENNSYLVANIA. *State and Local,* 1919, May 1; P. L. 103, being Pa. St. 1920, West Publ. Co., secs. 17571–17578. *First Class Cities,* 1919, June 25; P. L. 581, art. II, sec. 11, being Pa. St. 1920, secs. 2986–2991. *Second Class Cities,* 1911, May 12; P. L. 291, being Pa. St. 1920, secs. 3720–3722.

UNITED STATES. *D. C. and National.* Act of May 17, 1900, 36 Stat. L. 371, ch. 243.

VIRGINIA. *State,* Code, 1919, ch. 31 (sec. 581–585).

WISCONSIN. *Cities of First Class* (Milwaukee), 1911, ch. 318, amended by 1915, ch. 217.

[1] The text of a number of art commission laws and statutes will be found in *Laws Relating to Art Commissions,* printed for the Art Commission of the City of New York, May, 1914.

C. STATE PLANNING

A state planning department has been established in Pennsylvania, under 1919, Apr. 4; P. L. 45 (p. **604**). The Immigration and Housing Commission of California (1917, ch. 740, p. 1514, now General Laws, Act 1589, sec. 15–17) and the Department of Public Welfare of Massachusetts (General Laws, 1921, ch. 121, secs. 23, 26, 27, formerly the Homestead Commission) collect and disseminate planning information. In Massachusetts there is also a Federation of Planning Boards. For an account of the planning activities of the National Government, see p. 542, note.

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